FILED
MAY 5 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. [redacted]60

GILBERT TINSLEY

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND BRIEF IN SUPPORT THEREOF

CHAT CHANCELLOR,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 782

GILBERT TINSLEY

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice of the United States and the Justices of the Supreme Court Constituting the Supreme Court of the United States of America:

Comes Gilbert Tinsley and respectfully petitions this Honorable Court to review by writ of certiorari the decision of the Court of Appeals of Kentucky, the highest court of that Commonwealth, which decision affirmed the judgment of the Circuit Court of Shelby County, Kentucky, that your petitioner be confined to the State Penitentiary for a term of two (2) years.

Statement of the Matters Involved

Your petitioner respectfully submits that the actions of the courts of the Commonwealth of Kentucky deprived him of that Due Process of Law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America in that he was convicted of a felony and sentenced to serve a two-year term in the penitentiary without there being introduced against him any evidence of his guilt: But rather upon evidence of a *single remote fact* from which the courts of Kentucky permitted a jury to indulge a *presumption* of guilt. That the presumption itself was and is unreasonable, arbitrary, and not "a fair summary of experience" and that he was deprived of due process of law for the further reason that the presumption was "given effect of evidence to be weighed against opposing testimony" and was permitted to, *alone,* sustain a verdict of conviction.

The Facts

The Grand Jury of Shelby County, Kentucky, charged in an indictment returned on October 5, 1948, that your petitioner, Gilbert Tinsley, and his brother, Elmer Tinsley, had committed the crime of "grand larceny" by stealing eight (8) lambs of the value of Two Hundred ($200.00) Dollars from a Mr. Laban Jackson, and his mother, Mrs. Alph Jackson (Record, page 1). The prosecuting witnesses and the defendants reside in Shelby County, Kentucky, on farms about ten (10) or eleven (11) miles apart (Record, page 37).

Petitioner was tried separately before a Shelby County Jury on October 20, 1948, and was convicted. That conviction was reversed by the Court of Appeals of Kentucky upon a ground based upon state law and in the reversing opinion the Court of Appeals held that certain testimony

admitted upon the trial was incompetent and directed that such testimony not be received in evidence upon another trial (*Tinsley* v. *Commonwealth*, 312 Ky. 745, 229 S. W. (2d) 761).

Pursuant to reversal, a second trial was had before the judge and a jury of the Shelby Circuit Court on May 16, 1951 (Record, page 4). Petitioner was again convicted and sentenced to serve two (2) years in the penitentiary at hard labor (Record, page 6).

When the Commonwealth had introduced all of its evidence and had rested, it appeared that the only evidence introduced by the Commonwealth was directed toward identifying certain lambs found upon the farm of defendant and his brother as being the same lambs stolen from the prosecuting witness and his mother. No evidence had been introduced that in any way connected the defendant with the theft unless that evidence of a remote fact (possession of the fruits of the crime) could be given sufficient weight to create a presumption of guilt. Defendant then moved the Court to peremptorily instruct the jury to find for the defendant (Record, page 5).

The Trial Court, evidently relying upon certain decisions of the Court of Appeals of Kentucky wherein that Court had stated that possession of stolen property shortly after the theft creates a presumption of guilt which is of itself sufficient to sustain a conviction for larceny, overruled the motion for a peremptory instruction. The defendant excepted to the Court's ruling and proceeded to put on his evidence (Record, page 5).

At the close of all the evidence, both for the Commonwealth and for the defendant, nothing had been added to the evidence introduced by the Commonwealth while the defendant had testified that the lambs found upon his farm were not the same lambs stolen from the prosecuting wit-

ness and that he had had nothing whatever to do with the theft (Record, page 76). The defendant testified as to how many ewes he had wintered, how many he had sold and how many he had purchased so as to account for all the lambs upon the farm (Record, p. 66 to 71) and that evidence was documented by checks, invoices, etc. (Tinsley exhibits #1 to #5; Record, p. 21 to 26). This evidence was corroborated to a great extent by seven other witnesses (Record, p. 65 to 105).

At the close of all the evidence defendant again moved the Court to peremptorily instruct the jury to find him not guilty. The motion was again overruled and the defendant again excepted to the Court's ruling (Record, p. 107).

The cause was then submitted to the jury under instructions authorizing that jury to find the defendant guilty if they believed beyond a reasonable doubt, from the evidence they had heard, that the defendant was guilty of the charge (Record, p. 107 to 108). The jury returned a verdict of guilty and fixed the punishment at two (2) years in the penitentiary (Record, p. 6). Defendant then filed his "Motion and Grounds for a New Trial" (Record, p. 7). The Court overruled the motion and granted an appeal to the Court of Appeals of Kentucky (Record, p. 7).

On appeal it was urged that the Trial Court should have granted a continuance or have permitted the introduction of a certain affidavit of an absent witness (a purely local ground for reversal) and that the defendant had been denied due process of law under the Constitution of Kentucky and under the Fourteenth Amendment to the Constitution of the United States because the jury had been permitted to indulge a presumption that was itself unreasonable (that evidence of possession of the stolen property raised a presumption of guilt of larceny) and because the jury had been permitted to consider a presumption alone and to give

it the effect of evidence to be weighed in the balances against opposing evidence so as to determine the guilt or innocence of the accused.[1]

The Court of Appeals of Kentucky handed down its decision on November 7, 1952 (Record, p. 110 to 114). The judgment of conviction was affirmed. The Court held that the Trial Court did not err in refusing to grant a continuance nor in refusing to permit the introduction of "an absent witness affidavit" (the local ground relied upon for reversal) and further held that evidence of possession of stolen property shortly after the theft raises a presumption of guilt of larceny, that the presumption is reasonable and is, alone, sufficient to sustain a conviction for larency and that the defendant had therefore not been deprived of due process of law (Record, p. 114).[2]

A petition for rehearing was filed on December 12, 1952, (Record, p. 114 to 119), in which it was again urged that the defendant had been deprived of due process of law.[3] The petition was overruled without further opinion on February 6, 1953 (Record, p. 119).[4] Thereafter on February 6, 1953, orders were entered staying the execution of the judgment pending application to this Honorable Court for a review of the decision by writ of certiorari (Record, p. 120 to 122).

Jurisdiction

(a) Statutory Provision

This Court has jurisdiction to review the action of the Court of Appeals of Kentucky, the highest Court of that

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[1] See Brief filed below (Appendix "A"); KRS 433.290 providing that the evidence of the Commonwealth raises a presumption different from that relied upon (Appendix "B").

[2] See Decision of Court of Appeals of Kentucky (Appendix "C").

[3] See Petition for Rehearing (Appendix "D").

[4] See Order overruling Petition for Rehearing (Appendix "E").

Commonwealth, under the terms of Title 28, U. S. C. A., Section 1257, the applicable portion of which is in words and figures as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) . . .
>
> "(2) . . .
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States."

(b) The Right, Privilege, or Immunity Claimed

Your petitioner claims that he was denied that due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that being tried upon a charge of grand larceny, conflicting testimony was introduced by the Commonwealth of Kentucky and by the defendant upon the question of whether or not certain lambs, admittedly in the possession of the defendant, were the same lambs alleged to have been stolen from the complaining witness. That testimony being all that even remotely connected the accused with the larceny charged in the indictment, and being denied by the defendant, that question of fact on the *remote* issue (identity of the lambs) was treated as creating a presumption that petitioner (defendant and appellant below) was guilty of the crime of larceny and that presumption of guilt was submitted to the jury to be considered by them as evidence against the defendant. There was no other evidence that even attempted to connect the defendant with the crime. Therefore, the jury was permitted to find for or against the defendant upon the ultimate issue (guilt or innocence of larceny) wholly upon their determination of the issue of

fact created by the conflicting evidence as to the remote issue (identity of the lambs in defendant's possession).

Your petitioner respectfully asserts that he was denied due process of law because the presumption of guilt of larceny based *alone* upon evidence of possession of the fruits of the crime was an unreasonable presumption, not "a fair summary of experience";[5] and because the decision of the Court of Appeals of Kentucky permitted such a presumption or inference to be given effect of evidence to be weighed against opposing testimony[6] and to alone sustain a conviction.

(c) Time of Decision and of Application for Writ

The decision of the Court of Appeals of Kentucky was handed down on November 7, 1952 (Record, p. 110) (Appendix "C"). A petition for rehearing was duly filed on December 12, 1952, within the time prescribed by Section 360 of the Kentucky Criminal Code of Practice (Record, p. 114) (Appendix "D"). The petition for rehearing was overruled on February 6, 1953. (Record, p. 119) (Appendix "E"). This petition for a writ of certiorari is filed in this Court on May 5, 1953.

(d) When and How Federal Questions Were Raised and the Rulings of the Court Thereon

The question of whether there was evidence enough to submit his case to the jury was raised on the first trial by motion to peremptorily instruct the jury to find for the defendant (Former opinion, 312 Ky. 745; 229 S.W.(2d) 761).

That question was not argued upon the first appeal as a "due process" question because other evidence contained

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[5] *Bollenbach* v. *United States*, 326 U.S. 607; 66 S. Ct. 402; 90 L. ed. 350.

[6] *Western & A. R. Co.* v. *Henderson*, 279 U.S. 639; 49 S. Ct. 445; 73 L. ed. 884.

in that record would have made the circumstantial evidence rule applicable if that other evidence had been competent. The Court of Appeals of Kentucky declared that other evidence incompetent and therefore, it was not introduced upon the second trial.

Upon this second trial the question was raised in the Trial Court by motion for a peremptory instruction of acquittal made at the close of the evidence introduced by the Commonwealth (Record, p. 5). The motion was renewed at the close of all of the evidence (Record, p. 107). Both of these motions were overruled and defendant excepted to the Court's rulings thereon. Defendant assigned the Court's error in both these rulings in his Motion and Grounds for a New Trial which was overruled (Record, p. 7) and from which ruling an appeal was granted to the Court of Appeals of Kentucky (Record, p. 7).

Upon appeal from the Trial Court's actions your petitioner urged in brief that he had been deprived of Due Process of Law because the presumption indulged in below was unreasonable and arbitrary and because that presumption had been given effect beyond its legitimate function of temporarily supplying the place of evidence so as to govern proceedings and had been treated as evidence itself to be weighed against the defendant's opposing testimony so as to make an issue of fact for the jury to determine guilt or innocence based on whether they believed the *presumption* or the *evidence*.

The Court of Appeals considered the questions presented, adhered to the principle that a prima facie or rebuttable presumption of guilt of larceny is reasonable when based alone upon possession of stolen property and that such a presumption "is of itself sufficient to sustain conviction for larceny", and held that your petitioner had not been deprived of due process of law (Record, p. 113 to 114) (Appendix "C").

A petition for rehearing was filed in which the Court was urged to reconsider its decision and to reverse the judgment of conviction. The due process question was again urged (Record, p. 114) (Appendix "D") but the petition was overruled (Record, p. 119) (Appendix "E").

(e) Cases Believed to Sustain Jurisdiction

Norris v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579. 79 L. ed. 1074 (Headnote 3);

Whitfield v. *Ohio*, 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778;

Cissna v. *Tennessee*, 246 U. S. 289, 38 S. Ct. 306, 62 L. ed. 720.

(f) The Questions Involved are Substantial

(1) The Court of Appeals of Kentucky has decided a federal question, to-wit: that your petitioner was not deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States when he was tried and convicted for the crime of Grand Larceny upon evidence that in no way connected him with the crime charged except through the creation of an issue of fact as to whether or not property found in his possession was the same property that was the subject of the larceny.

This Honorable Court does not appear to have passed directly upon whether or not such a presumption is reasonable and such a fair summary of experience as to constitute due process of law but the decision of the Court of Appeals of Kentucky on that issue appears to be not in accord with the decision of this Court in the case of *Bollenbach* v. *United States*, 326 U. S. 607, 66 S. Ct. 402, 90 L. ed. 350.

In the *Bollenbach* case, certain securities were stolen in Minneapolis and a short time thereafter were found in the possession of the defendant in New York, the defendant

was indicted for transporting stolen securities in interstate commerce. The District Court, in that case, gave effect to a presumption almost identical to the presumption relied upon by the Commonwealth in the case at bar as shown by the following excerpt from that opinion:

> "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

In speaking of the presumption, the Supreme Court used this language:

> "The Government does not defend the 'presumption' as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in Tot v. United States, 319 U. S. 463, 87 L. ed. 1519, 63 S. Ct. 1241, even though that was embodied in an Act of Congress."

Mr. Justice Frankfurter, delivering the opinion of the Court, continued to discuss the reasonableness of the presumption and referred to the fact that the Government argued to the Supreme Court that the indulgence in the presumption reflected merely "a quite cursory" and hurried instruction and that the Government, in effect, had asked the Supreme Court to pay no attention "to this palpably erroneous" statement of the law by the trial judge. The District Judge had authorized the indulgence of the presumption not in his main charge to the jury but in answer to a direct question from the jury as to whether or not such a presumption could be indulged by them in deciding the facts of the case and the Supreme Court reversed the

case and established the utter unreasonableness of the presumption in these words:

> ". . . When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. *But he was not even 'cursorily' accurate. He was simply wrong.*" (Italics ours)

(2) This Honorable Court does not appear to have passed directly, in a criminal case, upon whether or not a presumption can be considered to have such qualities *of evidence* as to be weighed by the jury against opposing actual evidence in determining guilt or innocence but the decision of the Court of Appeals of Kentucky giving such *evidentiary* weight to the presumption here indulged in appears to be not in accord with this Court's decisions in civil cases, particularly those cases such as *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884, dealing with the weight that may be given to presumptions of negligence against railroad companies without constituting the taking of property without due process of law. Those civil cases would appear to be analogous to the case at bar in that this Court has held therein that a presumption of liability that operates to create "merely a temporary inference of fact that vanished upon the introduction of opposing evidence" is proper and legal but has condemned a presumption that "creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate".

In *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639; 73 L. ed. 884, the Supreme Court discussed the effect that may be given to presumptions in the light of the due process of

law guaranteed by the 14th Amendment and in the course of its opinion used this language:

> " . . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R Co.* v. *Brown,* 138 Miss. 39, 66 et seq. 102 So. 855; *Columbus & G. R. Co.* v. *Fondren,* 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.
>
> "The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment. *Manley* v. *Georgia,* supra; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; 60 L. ed. 899, 36 Sup. Ct. Rep. 498; *Bailey* v. *Alabama,* 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.
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> "Judgment reversed."

In the case at bar, the decision of the Court of Appeals of Kentucky would deprive your petitioner of his liberty by permitting a jury to consider evidence of a remote fact (was the property in his possession stolen property) and if that remote issue were resolved against the defendant to give to the presumption or inference thereby raised the effect of evidence to be weighed against opposing testimony and to *alone* sustain a verdict of "guilty".

Conclusion

For the foregoing reasons, petitioner prays that this his petition for a writ of certiorari be granted.

Respectfully submitted,

CHAT CHANCELLOR,
Counsel for Petitioner.

APPENDIX "A"

Brief for appellant, Gilbert Tinsley, on Appeal from the Shelby Circuit Court, filed in the Court of Appeals of Kentucky, on April 29, 1952; (applicable portions):

"THERE WAS NOT SUFFICIENT EVIDENCE TO TAKE THIS CASE TO THE JURY

"This question was presented upon the first appeal herein but the actions of the Commonwealth's Attorney at the first trial were so glaringly prejudicial that this Court reversed the conviction upon that ground and, after eliminating certain of the evidence as incompetent, reserved its decision as regards the question presented under this headnote.

"It is apparent from the above resume of the evidence that the Commonwealth made no attempt to directly connect the defendant with the theft charged in the indictment. Every sentence, word, and syllable of the proof introduced by the Commonwealth was directed to the sole purpose of identifying the lambs found in defendant's possession and claimed by the prosecuting witness Jackson. It is obvious that the Commonwealth was resting its entire case on its attempt to identify defendant's lambs as stolen property and to thereby create a presumption that defendant was guilty of the larceny charged.

"It is certainly true that this Court has used language in several of its opinions indicating that possession by the defendant of stolen property a short time after the theft is sufficient proof to raise a presumption that the defendant is guilty of larceny. The Commonwealth evidently had those cases in mind and sought only to raise that presumption of guilt and to rely upon it *alone* as authorizing the submission of this case to the jury and as being sufficient to support a verdict of guilty. That being the case, it is necessary to examine this Court's decisions that will no doubt be relied upon by the Commonwealth herein.

"The writers of this brief are familiar with the various cases decided by this Court wherein the general rule of law relied upon by the Commonwealth in this prosecution is often cited as absolute. We have studied those cases closely

and have found not one single case wherein that rule of law is announced and applied where the record and the opinion did not disclose *as a matter of fact* that other evidence *was* introduced connecting the accused with the commission of the larceny. In every instance that we have been able to discover, where the facts of the case disclose that possession of the subject of the larceny is the *only* proof connecting the defendant with the crime and the defendant has given a reasonable explanation of his possession, the rule has been stated differently.

"One of the best statements of the rule defining just what weight should be given to evidence directing itself entirely to identification of the articles charged as being the subject of the larceny is found in this Court's opinion in the case of *Rogers* v. *Commonwealth*, 289 Ky. 83, 158 S. W. 2d 144:

> " 'We are not unmindful of the rule that the possession of stolen property shifts the burden to the person who has possession of same to make a satisfactory explanation of the circumstances and facts under which the property came into his possession. *Stated differently, possession of stolen property creates only a rebuttable presumption of guilt* . . .' (Italics ours)

"The *Rogers* case was reversed because the evidence was insufficient to sustain a conviction, and in the course of the reversing opinion this Court repeatedly spoke of the 'rebuttable presumption of guilt' and the 'prima facie presumption of guilt.'

"See also *Blankenship* v. *Commonwealth*, 147 Ky. 768; 145 S. W. 752, another case in which the evidence was limited entirely to the appellant's possession of the stolen property and 'not another fact or circumstance appearing from the evidence connected him in the remotest degree with the theft of the shoes from the car.' In reversing the conviction in that case this Court used the following pertinent language:

> " ' . . . As the evidence of the commonwealth created but a mere suspicion of guilt on the part of appellant, and this suspicion was dispelled by the evidence in his behalf and as a whole, his acquittal should

have been directed by a peremptory instruction from the trial court.'

"See also *Bruce* v. *Commonwealth*, 191 Ky. 846; 232 S. W. 63, 65, wherein this Court again spoke of the effect of evidence of possession of stolen property as only being '*prima facie* evidence of guilt.'

"There are many other cases decided by this Court bearing upon the question here presented but we cite the above cases as clearly demonstrating that this Court has unequivocally adopted the majority opinion of the courts of this country that the introduction of evidence that the defendant had stolen property in his possession merely raises a 'rebuttable presumption' or a '*prima facie* presumption' of guilt.

"We think that this Court can judicially notice the fact that Spring lambs in August of the year of their birth are as alike as 'two peas in a pod.' They do not acquire facial characteristics as in the case of humans nor do they acquire distinctive markings of their coats as is true of dogs and certain other animals. This Court has repeatedly stated that if any rebuttable presumption is to be raised by reason of identification alone that it must actually be shown that the property in the possession of the defendant is stolen property 'since it is that fact which constitutes *corpus delicti* of the crime of larceny.' (*Bruce* v. *Commonwealth*, 191 Ky. 846; 232 S. W. 63, 65.)

"We must emphasize that in the case at bar the two witnesses who attempted to identify appellant's lambs as the subject of larceny based their identification entirely upon a brownish or reddish color that lambs belonging to the prosecuting witness had acquired. These two witnesses, Mr. Jackson and Mr. Bowling, were equally positive that the coloration was caused by the use of phenothiazine. Neither of these witnesses asserts any other reason for identifying the lambs and their evidence surely cannot be credited as even identifying the lambs when each of these witnesses testified on cross examination that the drug, phenothiazine, is widely used by sheep raisers in Shelby County and elsewhere and that there would be no reason why any other

farmer using the same drug and letting his lambs lie around a tobacco barn would not find his lambs colored the same distinctive color (Mr. Jackson, T. E., page 25; Mr. Bowling, T. E., page 40).

"We most earnestly insist that this record discloses no credible evidence upon which any presumption of guilt of any crime could be founded.

"If, in the case at bar, the proof introduced by the Commonwealth should be given its strongest effect (and cross examination of the Commonwealth's witnesses disclosed the basis of their identification of the lambs involved, was founded upon facts making the testimony almost entirely incredible) it was sufficient *only* to create the 'prima facie' or 'rebuttable' presumption of guilt mentioned in the above cited opinions of this Court. For this reason and solely because of the rebuttable presumption then existing, we will admit *arguendo* that the trial court properly overruled the motion for a peremptory made at the close of the Commonwealth's evidence.

"When the defendant took the stand to testify in his own behalf he had facing him a 'presumption' of his guilt raised by the evidence introduced by the Commonwealth but the defendant had on his own behalf the continuing presumption that he was an innocent person charged with the crime set out in the indictment. It makes little difference whether the presumption in favor of innocence continued to exist throughout the entire trial or disappeared when confronted by the presumption of guilt which we admit *arguendo* was created by the evidence introduced by the Commonwealth. The important thing is that the presumption of guilt was 'rebuttable' and that the evidence relied upon by the defendant to rebut that presumption was the only evidence that could possibly have been introduced by a presumably innocent defendant and for that reason cannot be attacked in any manner as not constituting a reasonable explanation of his possession of the lambs alleged to have been the subject of the larceny charged.

"The defendant testified positively that he, not only did not steal the lambs, but that he had not been on the farm

from which they were stolen for seven or eight years. He introduced in his own behalf the only testimony that could possibly be available to an innocent man. He told how many ewes he wintered during the winter of 1947-48 and produced two (2) witnesses to corroborate his statement. He told how many lambs were raised from those ewes and produced witnesses who corroborated his testimony to the extent of stating that they had seen his lambs in his fields and that defendant's statement of the number was approximately correct. He told of every transaction where he or his brother bought or sold lambs or sheep from the Spring of 1948 until the occasion of the accusation against him, and he documented every one of those transactions, except one, with stockyard bills, cancelled checks, or other record evidence (the one transaction not documented did not involve lambs and is apparently not questioned by the Commonwealth).

"There was much additional evidence introduced but all of the remainder of the testimony was directed toward the Commonwealth's attempt to identify the lambs. There was no evidence introduced by the Commonwealth that in any manner contradicted defendant's testimony as set out in the paragraph next above nor the evidence of the witnesses that corroborated said testimony.

"At the close of the testimony for the defendant, defendant again moved for a peremptory instruction of acquittal and it then became necessary for the trial court to weigh the evidence on the whole case so as to determine whether or not the case should go to the jury. On the Commonwealth's side of the scales there was at this final point in the trial nothing more than a presumption, while on the defendant's side of the scales there was direct, corroborated, and uncontradicted evidence that the defendant was not guilty as charged. We most earnestly insist to this Court that a presumption, which is not evidence at all but a mere substitute for evidence, cannot weigh in the scales against positive, uncontradicted evidence so as to make any question of fact for a jury to determine. That appears to be a rule of almost universal application.

"See Minutilla v. Providence Ice Cream Co., 50 R. I. 43; 144 A. 884; 63 A. L. R. 334, wherein the Court used this language:

> " '. . . a presumption is not evidence, but is only an excuse for not producing evidence, and, if met by satisfactory evidence, vanishes, and leaves nothing for the jury to pass upon.'

"See also the following cases:

> " 'Inferences or presumptions speak in the absence of evidence, but cannot be weighed in the balance as against evidence.' (Guaranty Trust Co. v. Minneapolis & St. L. R. Co., 36 F. (2d) 747) (Certiorari denied, 281 U. S. 756; 74 L. ed. 1166; 50 S. Ct. 407)
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> " 'Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.' (Lincoln v. French, 105 U. S. 614; 26 L. ed. 1189).
>
> " 'It has been stated that a presumption is "a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts".' (Jones, Ev. 2d ed., Section 32).
>
> " 'Presumptions which have their basis merely in convenience, . . . operates only until the defendant has produced some substantial countervailing evidence, some evidence sufficient to raise an issue, and when that has been done they drop out of the case. . . . It is also true that when the presumption rests upon common experience and inherent probability, it exhausts itself when the defendant produces substantial countervailing evidence.' (O'Dea vs. Amodeo, 118 Conn. 58; 170 A. 486).

"We most earnestly insist that the trial court erred in submitting this case to the jury because he was in effect holding as a matter of law that a presumption may be

weighed in the balances with actual positive, uncontradicted evidence. The trial court was probably swayed to his determination that a question of fact existed for the jury to determine, by the statements contained in some of this Court's decisions to the effect that mere evidence of possession of allegedly stolen articles is sufficient to carry the case to the jury. If the trial judge was influenced by the language of those decisions then we must point out again that such language was dictum in each case where it was used by this Court because the facts of each case where the statement was made disclosed that there actually was other and additional evidence connecting the accused with the crime charged. We will point out at a later point in this brief that this Court has specifically refused to give such weight to a rebuttable presumption identical with that sought to be established by the Commonwealth in the case at bar and has expressed grave doubts as to the constitutionality of such a presumption when created by statute. (Mansbach v. Commonwealth, 230 Ky. 604; 20 S. W. 2d 468).

"At this point in this brief, let us examine the presumption sought to be created by the identification of the lambs found on appellant's farm. The trial court held, when he overruled defendant's motion for a peremptory instruction, that proof of possession by the defendant of the stolen property created a presumption that the defendant was guilty of the crime of grand larceny charged in the indictment. It is most interesting to note that the trial court came to that conclusion upon the basis of dicta used in various of this Court's decisions when the Legislature has decreed that the possession by any person of any stolen property shall be prima facie evidence of his guilt as a person who has knowingly received stolen property. (KRS 433.290). It might well be noted also that while the trial court in following said dicta indulged the presumption that if a defendant is found in possession of stolen property, he is guilty of the larceny of that property, and the Legislature has indulged a presumption that such a person is guilty not of larceny but of knowingly receiving stolen property that any reasonable man might just as well in-

dulge the presumption that the person having the stolen property in his possession was an accessory after the fact and punishable for a misdemeanor under KRS 431.170 or even had honestly and innocently come into possession of the property. The statute supra and this Court's dicta hereinabove referred to would almost indicate that a person in possession of stolen property is faced with a presumption of guilt of whatever crime the prosecution might choose to charge him with. Surely such a 'scatter-gun' presumption cannot exist.

"We cannot but insert in this brief at this point the suggestion that the testimony identifying the property here involved was based upon such nebulous sources of identification as to make the most reasonable presumption of all that the lambs found on defendant Tinsley's farm were not the stolen lambs at all but had been purchased and/or raised by him and his brother in the very manner set out in defendant's uncontradicted testimony.

"These various presumptions and the unreasonableness of any of them that would imply the guilt of the defendant are discussed rather at length in the case of People v. Galbo, 218 N. Y. 283; 112 N. E. 1051; 2 A. L. R. 1220. In the Galbo case, the defendant, a cripple, was charged with the murder of one Francesco Manzella. Evidence was introduced which pointed rather conclusively to the defendant's having been in possession of and having disposed of the dismembered body of the victim, and the very presumption sought to be applied in the case at bar, to-wit: that possession of the fruit of the crime raised a sufficient presumption of guilt to sustain the conviction had in that case, was considered by the New York Supreme Court. We cite the following from that opinion:

> " 'The problem is a hard one. To solve it we must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law. It is an inference of fact . . . Other facts may neutralize it, or repel it, or render it so remote or tenuous or uncertain that in a given case we should reject it . . . The guilty possessor of the body, though he did not use the weapon, may still have aided and abetted; but, unless

there are tokens that several joined in the affray, the likelihood of his presence is no greater than the likelihood of his absence. He may still be an accessory; whether before the fact or after is the problem. If the circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion that would mitigate his guilt . . .

" '. . . We have no evidence, direct or circumstantial, that the actual perpetrator was assisted by anyone. We have nothing to tell us when or where the crime occurred. We have no sign that it was committed in the defendant's presence. He may have known of it in advance, and planned or encouraged it. He may have learned of it later, and attempted to shield the criminal. The trial judge told the jury that the burden was on the people to prove beyond a reasonable doubt that the defendant, though he did not kill with his own hand, was none the less a principal; he must have become connected with the crime while Manzella was yet alive. If all that he did was to help the murderer to escape, he was not a principal, but an accessory, and the jury, under the charge, were then required to acquit him . . . The charge is sound, but it propounded to the jury a problem incapable of reasoned solution.

" . . . .

"• • •

" '. . . In connecting him as a principal, conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt.'

"In the case at bar, the question of defendant's guilt or innocence was submitted to the jury when the only evidence connecting him with larceny charged in the indictment was testimony claiming to identify some of defendant's lambs as the lambs stolen from the prosecuting witness. The Court gave the usual instruction to the jury, charging that they should find the defendant not guilty if they had a reasonable doubt of the defendant being proved guilty *of the crime of grand larceny,* when the one hundred and thirty-

eight men of the Legislature of the Commonwealth of Kentucky had decreed in the enactment of KRS 433.290 that the facts presented to the jury by the Commonwealth raised a presumption that the defendant *had knowingly received stolen property,* a charge not contained in the indictment, and any of the other situations mentioned in the Galbo case, supra, might just as well have been presumed.

"The writers of this brief most earnestly insist that possession by any person of any stolen property is not sufficient *alone* to convict a defendant of larceny, knowingly receiving stolen property, as an accessory after the fact, or of any other crime whatsoever and we particularly call Your Honors' attention to the decision of this Court in the case of Mansbach v. Commonwealth, supra, 230 Ky. 604; 20 S. W. 2d 468. In the Mansbach case, as in the case at bar, the only evidence introduced by the Commonwealth was evidence identifying certain property in the defendant's possession as being stolen property. The only difference between that case and the case at bar is that there was no question as to the identity of the property in the Mansbach case, whereas, even the identity of the lambs involved in the case at bar rests upon evidence of very debatable value. In the Mansbach case this Court said:

> " 'We referred to that amendment in the recent case of Shaw v. Commonwealth, 229 Ky. 412, 17 S. W. (2d) 267, but the question was not raised therein, nor did we intend by the language we employed in that opinion to give greater effect to the presumption than as aiding the other proof in the case, so as, not only to authorize its submission to the jury, but likewise to uphold the verdict of guilty when there was other evidence to support it. We are thoroughly convinced that it was not the purpose of the Legislature to make the presumption arising from possession *alone* sufficient to authorize the jury to return a verdict of guilty, or the Court to pronounce judgment thereupon, . . .' (Italics theirs)

"This Court, in the Mansbach case, then goes on and refers to various other instances in which rebuttable presumptions have been created by statute and cites a long line

of cases demonstrating that this Court has never considered that a rebuttable presumption *alone* will carry the burden of proof in a civil case, and then says:

> "'. . . If the case of the statutory enacted presumption against railroads, involving no more than a civil action against them, should be so construed, a fortiori should such an enacted presumption in a criminal prosecution be so interpreted, and especially so when the very gravamen of the offense is attempted to be established by the statute . . .'

"This Court then concluded that the trial court erred in not directing appellant's acquittal.

"We most earnestly insist that the trial court erred in overruling defendant's motion for a peremptory instruction made at the conclusion of all of the evidence because the rebuttable presumption of guilt is not sufficient *alone* to sustain a conviction and the presumption was improperly permitted to be weighed against the direct, positive, and uncontradicted proof introduced by the defendant so as to make a question of fact for the jury to determine.

"The Actions of the Trial Court Denied to Appellant Due Process of Law and the Equal Protection of the Law

"All of the argument and all of the authorities cited under the headnote next hereinabove demonstrate the likelihood that the trial court denied to appellant due process of law under Section 11 of the Constitution of Kentucky and under the 14th Amendment to the Constitution of the United States in overruling the motion for a peremptory instruction of acquittal and submitting to the jury, as a question of fact, for it to determine, evidence which, at the very most, created a mere rebuttable presumption of guilt to be weighed in the balances against direct, positive, and uncontradicted testimony of innocence.

"We have heretofore in this brief refrained from mentioning argument or citing authority to this Court on the constitutional question. We have followed that course in this brief in recognition that constitutional questions will

ordinarily not be decided unless a decision that unconstitutional issue is necessary in arriving at a final determination of the case. Under this headnote, we will not reargue the matters set out under the headnote next hereinabove but we do wish to call this Court's attention to the authorities that demonstrate that the actions of the trial court, as heretofore argued herein, did as a matter of fact deny to appellant due process of law and equal protection of the law.

"In Western & A. R. Co. v. Henderson, 279 U. S. 639; 73 L. ed. 884, the Supreme Court discussed the effect that may be given to presumptions in the light of the due process of law guaranteed by the 14th Amendment and in the course of its opinion used this language:

> "'. . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. Gulf, M. & N. R. Co. v. Brown, 138 Miss. 39, 66 et seq. 102 So. 855; Columbus & G. R. Co. v. Fondren, 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.
>
> "'The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment. Manley v. Georgia, supra; McFarland v. American Sugar Co., 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep 145.
>
> "'Judgment reversed.'

"We think it follows from the above decision of the Supreme Court that:

"(1) If this Court follows its prior decisions holding that the presumption in the case at bar is a rebuttable presumption and, therefore, vanishes upon the introduction of opposing evidence then there was no question of fact to

submit to the jury and the trial court erred in refusing to give the peremptory instruction.

"(2) If this Court should follow the dicta found in another line of decisions and hold that the presumption is evidentiary in nature and, therefore, is to be given effect of evidence to be weighed against the defendant's opposing testimony, the defendant has been denied due process of law under both the State and the Federal Constitutions.

"The Supreme Court, however, has not stopped at laying down the law as to presumptions as shown by the above excerpt from Western & A. R. Co. v. Henderson. In the case of Bollenbach v. United States, 326 U. S. 607; 90 L. ed. 350, certain securities were stolen in Minneapolis and a short time thereafter were found in the possession of the defendant in New York, the defendant was indicted for transporting stolen securities in interstate commerce. The District Court, in that case, gave effect to a presumption almost identical to the presumption relied upon by the Commonwealth in the case at bar as shown by the following excerpt from that opinion:

> " 'I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.'

"In speaking of the presumption, the Supreme Court used this language:

> " 'The Government does not defend the "presumption" as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in Tot v. United States, 319 U. S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241, even though that was embodied in an Act of Congress.'

"Mr. Justice Frankfurter, delivering the opinion of the Court, continued to discuss the reasonableness of the pre-

sumption and referred to the fact that the Government argued to the Supreme Court that the indulgence in the presumption reflected merely 'a quite cursory' and hurried instruction and that the Government, in effect, had asked the Supreme Court to pay no attention 'to this palpably erroneous' statement of the law by the trial judge. The District Judge had authorized the indulgence of the presumption not in his main charge to the jury but in answer to a direct question from the jury as to whether or not such a presumption could be indulged by them in deciding the facts of the case and the Supreme Court reversed the case and established the utter unreasonableness of the presumption in these words:

> "'. . . When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instruction. *But he was not even "cursorily" accurate. He was simply wrong.*' (Italics ours.)

"The Supreme Court is not alone in its conception of the denial to a defendant of due process of law where a presumption is given weight that lifts it above its position of taking the place of evidence for purposes of governing procedure and bestows upon it evidentiary qualities by letting it be weighed in the scales against actual evidence. This Honorable Court had that constitutional issue presented to it in the case of Mansbach v. Commonwealth, supra, 230 Ky. 604, 20 S. W. 2d 468. That case has already been cited herein and is the case in which Mansbach was indicted for knowingly receiving stolen property and the Commonwealth's proof rested entirely upon the presumption contained in KRS 433.290, that the possession by any person of stolen property shall be prima facie evidence of his guilt under that section, and this Court used this language:

> "'But, regardless of the condition of the proof on the issue of appellant's reputation, it is difficult for us to understand the court's ruling in denying the

acquittal instruction, unless he was influenced by the amendment to the Statute, supra, of March 24, 1922, which is chapter 113, page 345, of the Session Acts for that year, saying: "The possession of any stolen goods shall be prima facie evidence of the guilt, under this section, of any person or persons having such possession." We are informed by counsel for appellant in their brief that the court was so influenced by that amendment, and which, if true, we think was error. It is contended in brief that, in so far as the amendment attempts to create a presumption of *knowledge* that the property was stolen, so as to sustain a verdict of guilty, it is unconstitutional, and it must be admitted that the contention is not entirely without support, but which it is not necessary to determine in this opinion, and for that reason it will not be done.' (Italics theirs.)

"The opinion in the Mansbach case was written in 1929 by the former and revered member of this Court, Judge Gus Thomas. It clearly demonstrates that at that early date, only seven years after the amendment creating the presumption had been enacted, there was grave doubt in the minds of this Court as to the constitutionality of the presumption contained in KRS 433.290, which is based upon the identical circumstances upon which the presumption indulged by the trial court was based. In that case, this Court did not decide the constitutional question but held instead that it was 'not the purpose of the Legislature to make the presumption arising from possession *alone* sufficient to authorize the jury to return a verdict of guilty, or the court to pronounce judgment thereupon.'

"The case at bar may also be decided upon the same interpretation of the meaning, purpose, and force to be given to the presumption sought to be raised by the Commonwealth herein because in this case, likewise, it is sought to sustain the conviction upon testimony of possession *alone*. But, if this Court should differ in any respect with appellant's statements of the facts herein or should be constrained to place any different or stronger interpretation

upon the presumption here involved, then surely the grave doubts expressed in the Mansbach opinion, when fortified by the Supreme Court decisions cited hereinabove under this headnote, require a decision that the trial court denied to this appellant due process of law in giving to the presumption in the case at bar sufficient effect to permit the jury to weigh it in the balances against actual, positive, uncontradicted evidence of innocence.

"We would further point out to Your Honors that the failure of the trial court to obey the mandate of Section 189 of the Criminal Code of Practice, which directs that all defendants who file an affidavit of what absent witnesses would testify to, may either have the cases continued or have the affidavit read to the jury as the evidence of the absent witness or witnesses, has denied to appellant herein the equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States.

"CONCLUSION

"In conclusion, we respectfully submit that the trial court committed prejudicial error when he refused to continue this cause or to permit the affidavit of the absent witness's testimony to be read to the jury; that the trial court committed a second prejudicial error when he refused appellant's motion for a directed verdict of acquittal; that appellant has, because of these actions, been denied due process of law and equal protection under the law as guaranteed to him by the State Constitution and the United States Constitution; and that this case should be reversed with directions that, in the event no additional evidence is offered by the Commonwealth, the trial court should direct a verdict of acquittal.

"Respectfully submitted,

"(S.) CHAT CHANCELLOR,
"Attorney for Appellant."

APPENDIX "B"

Kentucky Revised Statutes, Section 433.290:

"*Receiving stolen property.* Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section."

APPENDIX "C"

Decision of the Court of Appeals of Kentucky (November 7, 1952):

"COURT OF APPEALS OF KENTUCKY

APPEAL FROM SHELBY CIRCUIT COURT
Hon. J. Wirt Turner, Judge

"GILBERT TINSLEY, *Appellant,*

"*v.*

"COMMONWEALTH OF KENTUCKY, *Appellee*

"OPINION OF THE COURT BY JUDGE COMBS AFFIRMING

"The opinion on the first appeal of this case is reported in 312 Ky. 745, 229 S. W. 2d 761. On a second trial the defendant again was convicted of the theft of certain lambs and received the same sentence of two years in the penitentiary.

"We held on the first appeal that the Commonwealth Attorney had made prejudicial remarks to the jury in regard to an affidavit of the defendant, permitted by the court

to be read to the jury, as to what the witness Sam Ford would testify if he were present. On the second trial the court excluded the affidavit. The defendant contends it was incumbent upon the court either to permit the introduction of the affidavit, or to grant a continuance. He also insists he was entitled to a peremptory instruction of not guilty.

"When this Court's mandate was filed in the lower court on October 2, 1950, the defendant moved for a continuance to the February, 1951, term. In support of the motion he filed his affidavit stating, in substance, he could not obtain a fair trial without the presence of the witness Sam Ford. It was stated in the affidavit that affiant believed Ford lived in either Gallatin or Carroll County but spent a major portion of his time in the state of Florida. The affidavit included a statement of what the alleged witness Ford would testify if he were present. The court heard testimony in chambers on the merits of the motion, at which time the Commonwealth introduced the affidavit of the county court clerk of Gallatin County that no person by the name of Sam Ford was registered as a voter in that county; the affidavit of the sheriff of Henry County, which ajoins Gallatin and Carroll, that no person by the name of Sam Ford was listed for taxes in that county; the affidavit of the county court clerk of Carroll county that no such person as Sam Ford was registered as a voter in that county, and the affidavit of the sheriff of Carroll county that the name Sam Ford did not appear on the tax rolls of that county and that he knew no one by that name. After the hearing on the motion the case was continued to the February, 1951, term of court.

"At the February term the motion for continuance was renewed on the same grounds and another continuance granted to the May term.

"The case was called on May 8, 1951, and set for trial for May 16. On May 16 the court overruled defendant's motion for continuance and refused to permit him to read to the jury his affidavit as to what the witness Ford would testify.

"The defendant relies on Criminal Code of Practice, section 189, and those cases based on that section in which it has been said:

> " 'Under Section 189 of the Criminal Code of Practice, whenever an application shall be made by a defendant for continuance, based upon an affidavit stating the absence of a witness and the facts which such absent witness would, if present, prove, the attorney for the Commonwealth shall be compelled, in order to prevent a continuance, to admit that such absent witness would, if present, testify as alleged in the affidavit, although he no longer is required to admit the truth of the testimony.'

"This is the general rule. In fact, the quotation is taken from the former opinion in this case. But the rule is not inviolate as is shown by the language in *Harrison* v. *Commonwealth,* 266 Ky. 840, 100 S. W. 2d 837:

> " 'The test in 16 C. J. 469, Sec. 843, upholds the right of the court in a criminal prosecution on an application for continuance because of the absence of witnesses, to inform itself as to the truth of such alleged testimony, and when the court is convinced that the absent witness will testify to no such facts as are contained in the affidavit it has the right, in furtherance of justice and to prevent a miscarriage thereof, to shape its rulings in accordance with a sound discretion controlled by the particular facts of the case, and which we are convinced is a wholesome rule and should be applied in order to prevent trifling with the court by unscrupulous defendants who are shown to be guilty beyond a reasonable doubt and who are seeking a continuance for delay only.'

"The object of section 189 is to protect the rights of a defendant in event of the unavoidable absence of a material witness. Application of the rule ordinarily accomplishes a salutary result. It should be remembered, however, that all matters of procedure are subordinate to the one paramount rule that it is the duty of the courts to administer

justice and the application of no rule will be invoked which will result in the obstruction of justice. The following quotation from the Florida case of *Hall* v. *State,* 70 Fla. 48, 69 So. Rep. 692, is apropos:

> " 'Where the affidavit in a criminal cause for a continuance on the ground of the absence of witnesses complies strictly with the requirements of the rule in such applications, but the state, in opposition thereto, proves conclusively that no such parties as those named in the affidavit as the absent witnesses resided in the county where the crime was committed, and by proof makes out a strong probability that the parties named as the absent witnesses were not in existence anywhere, but were fictitious persons named as a ruse to secure delay only, the appellate court will not disturb the exercise by the trial court of the broad discretion vested in him in such cases in denying such application for continuance.'

"Here it was shown to the satisfaction of the court that there was no such witness as Sam Ford. We have made careful examination of the proceedings had on the motion for continuance and are of the opinion the court exercised a sound judicial discretion in this finding of fact. It follows that the court was correct in overruling the motion for continuance and in excluding the defendant's affidavit.

"The Commonwealth's case is based on the fact the stolen lambs were found in defendant's possession. There is no direct evidence otherwise connecting him with the theft of the lambs. He denied the theft and attempted to show that the lambs found in his possession belonged to him. It is argued that his possession of the lambs raised only a presumption of guilt, and that since the evidence in his behalf rebutted the presumption he was entitled to a peremptory instruction. We cannot agree. In the recent case of *Crouch* v. *Commonwealth,* (Ky.) 249 S. W. 2d 540, it was said:

> " 'The rule is that possession of stolen property shortly after the theft is not only presumptive evidence of guilt, casting upon the accused the burden of show-

ing his innocence by explaining his possession to the satisfaction of the jury, but is of itself sufficient to sustain conviction for larceny. *Moore* v. *Commonwealth*, 228 Ky. 643, 15 S. W. 2d 434. The jury was not compelled to accept the appellant's explanation as true, and the circumstances were such as to authorize a finding that the chickens had been stolen and that appellant was guilty of the theft.'

"The case of *Rogers* v. *Commonwealth*, 289 Ky. 83, 158 S. W. 2d 144, relied on by defendant, is explained and distinguished in the Crouch case.

"It was for the jury to decide whether defendant had satisfactorily explained the presumption of guilt raised by his possession of the stolen lambs. Two juries have refused to believe his explanation.

"What has already been said disposes of the contention that the defendant has been deprived of due process of law.

"The judgment is affirmed.

"Attorneys for Appellant:

FUNK, CHANCELLOR & MARSHALL,
Frankfort, Kentucky.

"Attorneys for Appellee:

J. D. BUCKMAN, JR.,
Attorney General;
ZEB A. STEWART,
Assistant Attorney General."

APPENDIX "D"

"COURT OF APPEALS OF KENTUCKY

Petition for Rehearing Filed by Appellant, Gilbert Tinsley

Appeal from Shelby Circuit Court, Honorable J. Wirt Turner, Judge

"GILBERT TINSLEY, *Appellant,*

vs.

"COMMONWEALTH OF KENTUCKY, *Appellee*

"PETITION FOR REHEARING

"Comes appellant, Gilbert Tinsley, and respectfully files this his petition for rehearing and petitions the Court to reconsider and withdraw the prepared opinion handed down on the 7th day of November, 1952, and to substitute therefor a new opinion reversing the judgment of conviction appealed from.

"On the original appeal two major grounds for reversal were urged. The first ground being that the trial court erred in refusing to continue this case and at the same time refusing to permit the defendant to read to the jury the affidavit of what the absent witness, Sam Ford, would have testified had he been present and testifying. Your petitioner insists that this ground urged for reversal should be sustained for two reasons.

"First, because the right of a defendant in a criminal prosecution to have a continuance or to have the deposition of the absent witness read is a statutory right granted to him by the Legislature. The right is absolute in its nature and the cases cited in the prepared opinion which appear to be based on general rules of law established by the Courts of various foreign jurisdictions can have no application in Kentucky where defendant's right to have the affidavit read if the Commonwealth would avoid a continuance is statutory (Criminal Code of Practice, Section

189) and expresses the legislative will in a situation such as that presented by the case at bar.

"The writer of this brief has respect that approaches veneration for the common law as it has developed in England and in this country from the mouths of the justices of our highest courts. BUT, as regards the question presented for review in the case at bar, the appellant has relied upon and attempted to avail himself of a right conferred upon him by expression of the legislative will and we most earnestly insist that a judicial decision of whether or not this defendant should be permitted to have the affidavit read to the jury should not deprive him of that statutory right.

"If the Commonwealth, through its prosecutors, does not believe that the statements contained in the affidavit are true then its remedy is to prosecute appellant for perjury and not to deprive him of his statutory right to have the affidavit read to the jury, so that the jury itself may determine whether or not to believe it.

"There is a second reason why this first ground urged for reversal should be sustained and that reason appears upon the face of the prepared opinion.

"The prepared opinion on Page 7 thereof uses this language in affirming the action of the trial court in overruling the motion for a continuance and excluding the defendant's affidavit:

> " 'Here it was shown to the satisfaction of the court that there was no such witness as Sam Ford. We have made careful examination of the proceedings had on the motion for continuance and are of the opinion the court exercised a sound judicial discretion in this finding of fact.'

"The Court's hearing into the existence or nonexistence of the absent witness, Sam Ford, took place in October, 1952. At that hearing, as reported on Page 25 of the Transcript of Record, the Commonwealth contended that no such person as Sam Ford existed and the trial Judge ordered the case continued until the February term of Court when the Commonwealth's Attorney announced that it would not admit the affidavit of the absent witness.

"At the February term the motion for continuance was renewed on the same grounds and another continuance was granted when the Commonwealth refused to permit the affidavit to be read to the jury. It is evident from the above that the Court did not make a finding of fact that there was no such witness as Sam Ford. The trial court entered of record no finding of fact whatsoever but it must be presumed that he found that the absent witness, Sam Ford, does exist or he would not have granted the continuance each time the Commonwealth refused to permit the affidavit to be read.

"It was at the February 1951 term of the Shelby Circuit Court that the last evidence was heard as to the whereabouts of Sam Ford and at the close of that hearing the Court used this language (Record, page 46):

> " 'By the Court: I will have to grant the continuance, unless the Commonwealth will admit the reading of the affidavit. I will not require the Commonwealth to admit the truth of the affidavit.'

"The last words the trial Judge said on this subject were those quoted next above and without hearing any other evidence whatsoever he refused to permit the affidavit to be read when the case came on for trial at the May 1951 term of Court.

"The language in the prepared opinion, to the effect that the judgment should be affirmed because it was shown to the satisfaction of the trial court that there was no such witness as Sam Ford, should be stricken from the opinion because the trial Judge made no such finding, and when that language is stricken from the opinion there remains no basis upon which the judgment can be affirmed.

"The second ground urged for reversal was that a verdict of acquittal should have been directed at the close of all the evidence and that the failure of the trial court to direct such a verdict denied to this appellant due process of law and the equal protection of the law in violation of the State and the Federal Constitutions.

"At the close of all the evidence in this case there was not one scintilla of evidence that the defendant was guilty of

the crime charged in the indictment. There *was* evidence that cast suspicion upon the defendant but none of that evidence was directed toward establishing, nor did it establish, the ultimate fact that the Commonwealth had assumed the burden of proving, to-wit: appellant's guilt of larceny. Much evidence was introduced that was competent to and did tend to establish a question of fact as to the identity of the lambs found upon appellant's farm but that evidence only created a rebuttable presumption of guilt while there was direct evidence of innocence offered by the defendant.

"The prepared opinion cites the recent case of Crouch v. Commonwealth (Ky.), 249 S. W. (2d) 540. The Crouch case was relied upon by the Commonwealth in brief and is distinguished from the case at bar on Page 8 of appellant's Reply Brief wherein it is pointed out that this Court carefully set out in the last paragraph of the opinion the additional evidence of that appellant's guilt which raised the evidence in that case above that of the creation of a mere rebuttable presumption.

"This Honorable Court has only once had presented to it the constitutional question that arises when an attempt is made to weigh in the balances evidence, on the one hand, and a rebuttable presumption, on the other. The question was presented in the case of Mansbach v. Commonwealth, 230 Ky. 604, 20 S. W. (2d) 468, relied upon by appellant in his original brief, and cited on Page 37 of that original brief. This Court specifically did not determine the constitutional question in the Mansbach case but strongly indicated that a conviction upon such a presumption *alone* would deny due process to a defendant.

"The prepared opinion does not specifically answer the question of whether or not defendant has been deprived of due process of law and of equal protection under the laws. An express decision upon that question is requested.

"Appellant insists that the arguments presented in the original brief herein clearly demonstrate a violation of constitutional rights as regards due process and equal protection and we submit this petition for a rehearing with a great amount of confidence that a reconsideration of the arguments presented on pages 32 to 39 of appellant's original

brief will demonstrate to this Honorable Court that this defendant has been denied due process of law 'and equal protection under the laws by the holding that a rebuttable presumption' is 'evidence' of guilt that may be weighed in the balances against actual, direct proof of innocence.

"We respectfully call your Honor's attention to the following excerpt from Western & A. R. Co. v. Henderson, 279 U. S. 639 (Page 3 of original brief for appellant):

> " '. . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. *The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence.* Gulf, M. & N. R. Co. v. Brown, 138 Miss. 39, 66 et seq. 102 So. 855; Columbus & G. R. Co. v. Fondren, 145 Miss. 679, 110 So. 365. *That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony* and is to prevail unless such testimony is found by the jury to preponderate.
>
> " 'The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment. Manley v. Georgia, supra; McFarland v. American Sugar Co., 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.
>
> " 'Judgment reversed.' (Italics ours.)

"Respectfully submitted,

"FUNK, CHANCELLOR & MARSHALL,
"By (S.) CHAT CHANCELLOR,
"Attorneys for Appellant."

APPENDIX "E"

Order of the Court of Appeals overruling appellant's Petition for Rehearing:

"ORDERS—KENTUCKY COURT OF APPEALS

"Winter Term, February 6th, 1953

"TINSLEY *v.* COMMONWEALTH—SHELBY

"The Court being sufficiently advised, it is considered that the petition of appellant for a rehearing be and the same is overruled."

APPENDIX "F"

Opinion of the Court of Appeals on the first appeal, May 2, 1950:

"TINSLEY *v.* COMMONWEALTH

"Appellant was convicted of grand larceny and sentenced to serve two years in the State Reformatory. On this appeal, he urges six grounds for reversal: (1) the court erred in failing to continue the case because counsel for appellant had not had sufficient time to prepare appellant's defense; (2) the lower court erred by failing to continue the case because of the absence of defendant's witness, Sam Ford; (3) the lower court erred in refusing to require the Commonwealth to admit the truth of the statements as to the testimony which would be given by the witness, Sam Ford, if he were present and under oath; (4) the court erred in admitting incompetent evidence over the objection of defendant; (5) the evidence was not sufficient to take the case to the jury nor to sustain the verdict; and (6) statements of the Commonwealth's attorney in his argument were prejudicial to the rights of defendant and require that the case be reversed.

"Since we feel compelled to reverse the judgment because of the improper argument of the Commonwealth's attorney, and since some of the questions presented cannot again

occur, and the evidence on the next trial likely will be different by the production or failure to produce the witness, Sam Ford, it is necessary for us to discuss only the fourth and sixth grounds assigned for reversal of the judgment.

"(1) When the case was called for trial, the defendant asked for a continuance supported by his affidavit that after due diligence he was unable to procure the presence of Sam Ford as a witness in his behalf. The affidavit recited the facts to which Sam Ford would testify if present at the trial. The court overruled the motion for continuance but permitted appellant to read the affidavit and admonished the jury that they would consider the facts stated in the affidavit as the absent witness's evidence in the case as if he were present and testifying under oath.

"Had the jury given full credence to the statements contained in the affidavit, they would have found appellant not guilty, because Ford's testimony as recited in the affidavit completely exonerated appellant of any guilt. In his closing argument the Commonwealth attorney made the following statements to the jury: 'I don't believe there ever was such a man as Sam Ford, * * * Sam is the little man that wasn't there, and why do I say he was the little man that wasn't there? Well, is there in this record one single fact to prove that there is any such man as Sam Ford?' and 'Well, now, if he had cashed it (a check) the fourth or fifth I would have thought something about Sam, but gentlemen, Sam is the little man that wasn't there.'

"Under section 189 of the Criminal Code of Practice, whenever an application shall be made by a defendant for continuance, based upon an affidavit stating the absence of a witness and the facts which such absent witness would, if present, prove, the attorney for the Commonwealth shall be compelled, in order to prevent a continuance, to admit that such absent witness would, if present, testify as alleged in the affidavit, although he no longer is required to admit the truth of the testimony. In Noel v. Commonwealth, 227 Ky. 578, 13 S. W. 2d 763 and cases therein cited, this Court declared that when an affidavit is filed with the understanding that it is to be read as the deposition of a witness, it is reversible error for the court to permit the Commonwealth

to prove that no such person is in existence, and testimony to the effect that the absent witness is a fictitious person is inadmissible. Certainly an argument by the Commonwealth's attorney to that effect, which is not even based on evidence, must be deemed to be prejudicial error. Cook v. Commonwealth, 86 Ky. 663, 7 S. W. 155.

"There are two grounds for pronouncing the Commonwealth's attorney's action erroneous and a third reason for declaring it to be prejudicial: (1) the argument is not supported by the evidence or any other part of the record; (2) had evidence been introduced over objection of appellant to support the argument, its introduction would have constituted error; and (3) the statement of the Commonwealth's attorney as to his personal belief in respect to a material fact in the trial of a criminal case invariably bears more weight with the jury than any single line of evidence presented by witnesses who are not clothed with the authority of the office of Commonwealth's attorney. The jury well knows that the office of Commonwealth's attorney places its occupant in position to obtain information which he oftimes is unable to introduce in the trial of a case, and any statement of his personal belief is received by the jury as an implication that the attorney for the Commonwealth has information, in addition to that presented on the trial, upon which to base his conclusion. In Edwards v. Commonwealth, 298 Ky. 366, 182 S. W. 2d 948, 951 we quoted with approval from Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 633, 79 L. ed. 1314:

" ' "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods cal-

culated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

" ' "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." '

"As was pointed out in the Edwards opinion, supra, the Commonwealth's attorney is related to the Commonwealth in the same degree that the United States attorney is related to the Federal Government. For these reasons the judgment must be reversed and since a new trial likely will be had, it is necessary for us to pass on the fourth ground for reversal; viz., the court erred in admitting incompetent evidence over the objection of the defendant.

"(2, 3) Appellant was tried on an indictment for grand larceny in allegedly stealing several lambs from the prosecuting witness Labon Jackson and his mother, Mrs. Alpha Jackson. The prosecuting witness was permitted to testify concerning information he stated was received by him from the Federal Bureau of Investigation in Louisville. This evidence was hearsay, therefore, incompetent, and should not have been admitted in evidence. The witness D. Richard Ellis was one of several Shelby County farmers who recently had lost sheep. He was permitted to testify that he visited the barn of appellant in search of some lambs which had been stolen from him, and that he had found his lambs in appellant's barn. This evidence was incompetent as it did not establish a plan or design of the defendant in committing a series of crimes. It was simply evidence that appellant had committed a crime with which he was not charged in the indictment. On the next trial such evidence may not be introduced by the Commonwealth.

"Our decision in respect to the other questions raised is reserved. The judgment is reversed for proceedings consistent with this opinion."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 782

GILBERT TINSLEY,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The decision below was handed down by the Court of Appeals of Kentucky, the highest Court of that Commonwealth, on November 7, 1952, and petition for rehearing was overruled by that Court on February 6, 1953. The decision appears in the record herein beginning on page 110. It also appears as "Appendix C" attached to the petition for writ of certiorari, but is not yet officially reported.

JURISDICTION

(a) Statutory Provision

This Court has jurisdiction to review the action of the Court of Appeals of Kentucky, the highest Court of that

Commonwealth, under the terms of Title 28, U. S. C. A., Section 1257, the applicable portion of which is in words and figures as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "(1) . . . . . .
> "(2) . . . . . .
> "(3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, ... of . . . . . the United States."

(b) The Right, Privilege, or Immunity Claimed

Your petitioner claims that he was denied that due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that being tried upon a charge of grand larceny, conflicting testimony was introduced by the Commonwealth of Kentucky and by the defendant upon the question of whether or not certain lambs, admittedly in the possession of the defendant, were the same lambs alleged to have been stolen from the complaining witness. That testimony being all that even remotely connected the accused with the larceny charged in the indictment, and being denied by the defendant, that question of fact on the *remote* issue (identity of the lambs) was treated as creating a presumption that petitioner (defendant and appellant below) was guilty of the crime of larceny and that presumption of guilt was submitted to the jury to be considered by them as evidence against the defendant. There was no other evidence that even attempted to connect the defendant with the crime. Therefore, the jury was permitted to find for or against the defendant upon the ultimate issue (guilt or innocence of larceny) wholly upon their determination of the issue of fact created by the conflicting evidence as to the remote

issue (identity of the lambs in defendant's possession).

Your petitioner respectfully asserts that he was denied due process of law because the presumption of guilt of larceny based *alone* upon evidence of possession of the fruits of the crime was an unreasonable presumption, not "a fair summary of experience";[7] and because the decision of the Court of Appeals of Kentucky permitted such a presumption or inference to be given effect of evidence to be weighed against opposing testimony[8] and to alone sustain a conviction.

(c) Time of Decision and of Application for Writ

The decision of the Court of Appeals of Kentucky was handed down on November 7, 1952 (Record, p. 110). A petition for rehearing was duly filed on December 12, 1952, within the time prescribed by Section 360 of the Kentucky Criminal Code of Practice (Record, p. 114). The petition for rehearing was overruled on February 6, 1953 (Record, p. 119). This petition for a writ of certiorari is filed in this Court on May 5, 1953.

(d) When and How Federal Questions Were Raised and the Rulings of the Court Thereon

The question of whether there was evidence enough to submit his case to the jury was raised on the first trial by motion to peremptorily instruct the jury to find for the defendant (Former opinion, 312 Ky. 745; 229 S. W. (2d) 761).

That question was not argued upon the first appeal as a "due process" question because other evidence contained in that record would have made the circumstantial evidence rule applicable if that other evidence had been competent.

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[7] *Bollenbach* v. *United States*, 326 U.S. 607; 66 S. Ct. 402; 90 L. ed. 350.

[8] *Western & A. R. Co.* v. *Henderson*, 279 U. S. 639; 49 S. Ct. 445; 73 L. ed. 884.

The Court of Appeals of Kentucky declared that other evidence incompetent and, therefore, it was not introduced upon the second trial.

Upon this second trial the question was raised in the Trial Court by motion for a peremptory instruction of acquittal made at the close of the evidence introduced by the Commonwealth (Record, p. 5). The motion was renewed at the close of all of the evidence (Record, p. 107). Both of these motions were overruled and defendant excepted to the Court's rulings thereon. Defendant assigned the Court's error in both these rulings in his Motion and Grounds for a New Trial which was overruled (Record, p. 7), and from which ruling an appeal was granted to the Court of Appeals of Kentucky (Record, p. 7).

Upon appeal from the Trial Court's actions your petitioner urged in brief that he had been deprived of Due Process of Law because the presumption indulged in below was unreasonable and arbitrary and because that presumption had been given effect beyond its legitimate function of temporarily supplying the place of evidence so as to govern proceedings and had been treated as evidence itself to be weighed against the defendant's opposing testimony so as to make an issue of fact for the jury to determine guilt or innocence based on whether they believed the *presumption* or the *evidence*.

The Court of Appeals considered the questions presented, adhered to the principle that a prima facie or rebuttable presumption of guilt of larceny is reasonable when based alone upon possession of stolen property and that such a presumption "is of itself sufficient to sustain conviction for larceny", and held that your petitioner had not been deprived of due process of law (Record, p. 113 to 114).

A petition for rehearing was filed in which the Court was urged to reconsider its decision and to reverse the judgment

of conviction. The due process question was again urged (Record, p. 114) but the petition was overruled (Record, p. 119).

(e) Cases Believed to Sustain Jurisdiction

Norris v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. ed. 1074 (Headnote 3);
Whitfield v. *Ohio*, 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778;
Cissna v. *Tennessee*, 246 U. S. 289, 38 S. Ct. 306, 62 L. ed. 720.

(f) The Questions Involved Are Substantial

(1) The Court of Appeals of Kentucky has decided a federal question, to-wit: That your petitioner was not deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States when he was tried and convicted for the crime of Grand Larceny upon evidence that in no way connected him with the crime charged except through the creation of an issue of fact as to whether or not property found in his possession was the same property that was the subject of the larceny.

This Honorable Court does not appear to have passed directly upon whether or not such a presumption is reasonable and such a fair summary of experience as to constitute due process of law but the decision of the Court of Appeals of Kentucky on that issue appears to be not in accord with the decision of this Court in the case of *Bollenbach* v. *United States*, 326 U. S. 607, 66 S. Ct. 402, 90 L. ed. 350.

In the *Bollenbach* case, certain securities were stolen in Minneapolis and a short time thereafter were found in the possession of the defendant in New York, the defendant was indicted for transporting stolen securities in interstate commerce. The District Court, in that case, gave effect to

a presumption almost identical to the presumption relied upon by the Commonwealth in the case at bar as shown by the following excerpt from that opinion:

> "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

In speaking of the presumption, the Supreme Court used this language:

> "The Government does not defend the 'presumption' as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in Tot v. United States, 319 U. S. 463; 87 L. ed. 1518; 63 S. Ct. 1241, even though that was embodied in an Act of Congress."

Mr. Justice Frankfurter, delivering the opinion of the Court, continued to discuss the reasonableness of the presumption and referred to the fact that the Government argued to the Supreme Court that the indulgence in the presumption reflected merely "a quite cursory" and hurried instruction and that the Government, in effect, had asked the Supreme Court to pay no attention "to this palpably erroneous" statement of the law by the trial judge. The District Judge had authorized the indulgence of the presumption not in his main charge to the jury but in answer to a direct question from the jury as to whether or not such a presumption could be indulged by them in deciding the facts of the case and the Supreme Court reversed the case and established the utter unreasonableness of the presumption in these words:

> ". . . When a jury makes explicit its difficulties a trial judge should clear them away with concrete

accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. *But he was not even 'cursorily' accurate. He was simply wrong.*" (Italics ours)

(2) This Honorable Court does not appear to have passed directly, in a criminal case, upon whether or not a presumption can be considered to have such qualities *of evidence* as to be weighed by the jury against opposing actual evidence in determining guilt or innocence but the decision of the Court of Appeals of Kentucky giving such *evidentiary* weight to the presumption here indulged in appears to be not in accord with this Court's decisions in civil cases, particularly those cases such as *Western & A. R. Co.* v. *Henderson*, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884, dealing with the weight that may be given to presumptions of negligence against railroad companies without constituting the taking of property without due process of law. Those civil cases would appear to be analogous to the case at bar in that this Court has held therein that a presumption of liability that operates to create "merely a temporary inference of fact that vanished upon the introduction of opposing evidence" is proper and legal but has condemned a presumption that "creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate".

In *Western & A. R. Co.* v. *Henderson*, 279 U. S. 639; 73 L. ed. 884, the Supreme Court discussed the effect that may be given to presumptions in the light of the due process of law guaranteed by the 14th Amendment and the course of its opinion used this language:

". . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running locomotives or cars. The Mississippi statute created

merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & R. Co.* v. *Brown*, 138 Miss. 39, 66 et seq. 102 So. 855; *Columbus & G. R. Co.* v. *Fondren*, 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

"The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment. *Manley* v. *Georgia*, supra; *McFarland* v. *American Sugar Co.* 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

"Judgment reversed."

In the case at bar, the decision of the Court of Appeals of Kentucky would deprive your petitioner of his liberty by permitting a jury to consider evidence of a remote fact (was the property in his possession stolen property) and if that remote issue were resolved against the defendant to give to the presumption or inference thereby raised the effect of evidence to be weighed against opposing testimony and to *alone* sustain a verdict of "guilty".

STATEMENT OF THE CASE

The Grand Jury of Shelby County, Kentucky, charged in an indictment returned on October 5, 1948, that your petitioner, Gilbert Tinsley, and his brother, Elmer Tinsley, had committed the crime of "grand larceny" by stealing eight (8) lambs of the value of Two Hundred ($200.00) Dollars from a Mr. Labon Jackson, and his mother, Mrs. Alph Jackson (Record, pages 1-2). The prosecuting witnesses and the defendants reside in Shelby County, Ken-

tucky, on farms about ten (10) or eleven (11) miles apart (Record, page 37).

Petitioner was tried separately before a Shelby County Jury on October 20, 1948, and was convicted. That conviction was reversed by the Court of Appeals of Kentucky upon a ground based upon state law and in the reversing opinion the Court of Appeals held that certain testimony admitted upon the trial was incompetent and directed that such testimony not be received in evidence upon another trial (*Tinsley* v. *Commonwealth,* 312 Ky. 745; 229 S. W. (2d) 761).

Pursuant to reversal, a second trial was had before the judge and a jury of the Shelby Circuit Court of May 16, 1951 (Record, page 4). Petitioner was again convicted and sentenced to serve two (2) years in the penitentiary at hard labor (Record, p. 6).

When the Commonwealth had introduced all of its evidence and had rested, it appeared that the only evidence introduced by the Commonwealth was directed toward identifying certain lambs found upon the farm of defendant and his brother as being the same lambs stolen from the prosecuting witness and his mother. No evidence had been introduced that in any way connected the defendant with the theft unless that evidence of a remote fact (possession of the fruits of the crime) could be given sufficient weight to create a presumption of guilt. Defendant then moved the Court to peremptorily instruct the jury to find for the defendant (Record, p. 5).

The trial Court, evidently relying upon certain decisions of the Court of Appeals of Kentucky wherein that Court had stated that possession of stolen property shortly after the theft creates a presumption of guilt which is of itself sufficient to sustain a conviction for larceny, overruled the motion for a peremptory instruction. The defendant ex-

cepted to the Court's ruling and proceeded to put on his evidence (Record, p. 5).

At the close of all the evidence, both for the Commonwealth and for the defendant, nothing had been added to the evidence introduced by the Commonwealth while the defendant had testified that the lambs found upon his farm were not the same lambs stolen from the prosecuting witness and that he had had nothing whatever to do with the theft (Record, p. 76). The defendant testified as to how many ewes he had wintered, how many he had sold and how many he had purchased so as to account for all the lambs upon the farm (Record, p. 66 to 71) and that evidence was documented by checks, invoices, etc. (Tinsley exhibits #1 to #5; Record, p. 21 to 26). This evidence was corroborated to a great extent by seven other witnesses (Record, p. 65 to 105).

At the close of all the evidence defendant again moved the Court to peremptorily instruct the jury to find him not guilty. The motion was again overruled and the defendant again excepted to the Court's ruling (Record, p. 107).

The cause was then submitted to the jury under instructions authorizing that jury to find the defendant guilty if they believed beyond a reasonable doubt, from the evidence they had heard, that the defendant was guilty of the charge (Record, p. 107 to 108). The jury returned a verdict of guilty and fixed the punishment at two (2) years in the penitentiary (Record, p. 6). Defendant then filed his "Motion and Grounds for a New Trial" (Record, p. 7). The Court overruled the motion and granted an appeal to the Court of Appeals of Kentucky (Record, p. 7).

On appeal it was urged that the Trial Court should have granted a continuance or have permitted the introduction

of a certain affidavit of an absent witness (a purely local ground for reversal) and that the defendant had been denied due process of law under the Constitution of Kentucky and under the Fourteenth Amendment to the Constitution of the United States because the jury had been permitted to indulge a presumption that was itself unreasonable (that evidence of possession of the stolen property raised a presumption of guilt of larceny) and because the jury had been permitted to consider a presumption alone and to give it the effect of evidence to be weighed in the balances against opposing evidence so as to determine the guilt or innocence of the accused.

The Court of Appeals of Kentucky handed down its decision on November 7, 1952 (Record, pp. 110 to 114). The judgment of conviction was affirmed. The Court held that the Trial Court did not err in refusing to grant a continuance nor in refusing to permit the introduction of "an absent witness affidavit" (the local ground relied upon for reversal) and further held that evidence of possession of stolen property shortly after the theft raises a presumption of guilt of larceny, that the presumption is reasonable and is, alone, sufficient to sustain a conviction for larceny and that the defendant had therefore not been deprived of due process of law (Record, p. 114).

A petition for rehearing was filed on December 12, 1952 (Record, pp. 114 to 119), in which it was again argued that the defendant had been deprived of due process of law. The petition was overruled without further opinion on February 6, 1953 (Record, p. 119). Thereafter on February 6, 1953, orders were entered staying the execution of the judgment pending application to this Honorable Court for a review of the decision by writ of certiorari (Record, pp. 120 to 122).

THE EVIDENCE

Under this heading a resumé in as concise a form as practicable of the evidence heard upon the trial of this cause in the Circuit Court of Shelby County, Kentucky, will be set out, in order that it may be apparent that no evidence was introduced connecting your petitioner with the crime of grand larceny charged in the indictment, except that there was introduced conflicting evidence as to whether or not certain lambs found in petitioner's possession were the same lambs that were charged to have been the subject of the larceny, and in order to demonstrate that the courts of Kentucky construed that evidence of the remote fact (identity) as being sufficient to raise a presumption that your petitioner was guilty of the larceny charged in the indictment, and in order to demonstrate that the presumption so indulged in was all that in any manner connected your petitioner with the crime charged and was permitted to be weighed by the trier of facts (the jury) against positive, uncontradicted evidence of your petitioner's innocence and to alone support the verdict of guilty. Counsel urges that it is proper that this Court consider this evidence for, as stated in the case of *Mackay, et al.* v. *Dillon*, 45 U. S. (4 How.) 421, 447, 11 L. Ed. 1038, 1050:

> ". . . this court has no jurisdiction to consider and revise the decision of a State court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of State courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a State, when

reversing the proceedings of inferior courts of original jurisdiction— . . ."

The summary of the evidence heard is as follows:

(1) THE EVIDENCE INTRODUCED BY THE COMMONWEALTH: The Commonwealth introduced five (5) witnesses. The testimony of these witnesses can be summarized as follows:

LABAN JACKSON (Record, p. 27 to 45) testified that he is a raiser of livestock including sheep and lambs; that he lives in the north section of Shelby County about ten (10) or eleven (11) miles from appellant's farm; that on Saturday, August 7, 1948, he counted his lambs; and that thereafter on Wednesday, August 11, 1948, he discovered that twelve (12) lambs were missing and found evidence that the lambs had been tied and lifted over his fence.

This witness also testified that his lambs were of mixed breeds (commonly called "grade" lambs) and that they had acquired a brownish color from lying around a tobacco barn in dry feces and urine from phenothiazine fed to them (Record, p. 35); that on Thursday, August 12th, he was looking for the missing lambs and about 2:00 P. M., in crossing a portion of appellant's farm, approached to about three hundred (300) yards of a group of lambs in one of appellant's fields and from that distance tentatively identified his missing lambs as being among that flock (Record, p. 40). Mr. Jackson testified that he then went to Shelbyville, returned to appellant's farm with the Sheriff about 6.40 P. M., secured permission from appellant's family to examine the lambs, and concluded that "about ten" were the same lambs stolen from him. He then left appellant's farm and the next day, Friday, August 13th, made the customary affidavit and secured from the Shelby County Court an order of delivery for twelve lambs (the number he

had lost) (Record, pp. 31 to 33). The witness, the Sheriff, a state policeman, and others then returned to appellant's farm with the order of delivery. They drove appellant's lambs up into a barn, examined them carefully, and the prosecuting witness finally selected four of the lambs, claiming they belonged to him (Record, pp. 33 to 34).

This witness, who was the principal prosecuting witness, also testified that the lambs on the Tinsley farm were of mixed breeds (commonly called "grade" lambs) (Record, p. 37); that some were "Southdown lambs similar to the ones raised by (the witness)" (Record, p. 37); that all of the lambs in the Tinsley flock were "just about the same" size and weight as the lambs raised by the prosecuting witness (Record, p. 38); that the field in which the lambs were found "came up to" a tobacco barn located on appellant's farm (Record, p. 42); and that the tobacco barn and its environs showed evidence (feces, etc.) of having been used by the Tinsley lambs (Record, p. 36).

This prosecuting witness further testified that phenothiazine is widely used by approximately sixty (60%) per cent of the sheep raisers in Shelby County (Record, p. 42 (other witnesses testified that this drug was actually used by appellant and his brother: Gilbert Tinsley (Record, pp. 71-72) and Stanley Smith (Record, p. 86) and that there would be no reason why if other farmers used the same drug and let their sheep run around in a tobacco barn they would not color the same as his lambs were colored.

This witness also testified that on Friday, August 13th, he discovered that eight (8) lambs had been returned to his farm and that he believed four (4) of those lambs were four (4) of those theretofore stolen from him but that he could not identify the ownership of the other four (4) returned.

CHARLES BOWLING (Record, pp. 45-52) testified that he lives at Eminence, Kentucky, and works on the farm of Mr. Jackson. He testified that twelve (12) lambs were stolen from the Jackson farm betwen August 7th and August 11th, 1948, and that he helped Mr. Jackson pick out the four (4) lambs taken from appellant's farm and *identified them by their color.* This witness is positive that the distinctive color was caused by the use of phenothiazine. He knows that the drug is widely used and testified positively that any farmer who used the drug and whose lambs had to lie around a tobacco barn would find his lambs colored the same distinctive color (Record, p. 52). This witness took the four (4) lambs to the Jackson farm, turned them out into the field the next morning, and testified that one of them nursed one of the ewes in that field (Record, p. 51).

DEE RICHARD ELLIS (Record, pp. 53-55) went with Mr. Bowling to take the four (4) lambs to the Jackson farm and testified that the lambs went into the Jackson barn when they were turned out (Record, p. 54). He also testified that there is nothing unusual about a lamb that has been weaned only a few days trying to steal milk from another ewe (Record, p. 54-55).

JOHN ISHAM (Record, pp. 55-59) testified that he lives at Danville, Kentucky; that he is a detective with the Kentucky State Police and that he accompanied the prosecuting witness, Mr. Jackson, on his 2:00 P. M. visit to the Tinsley farm when Mr. Jackson tentatively identified his alleged lambs from a distance of three hundred (300) yards. The witness also returned with the Sheriff and Mr. Jackson when four (4) lambs were finally claimed by Mr. Jackson. Mr. Isham testified that he could notice no difference in the appearance of the four (4) lambs except that they were "a darker color like" than the other lambs (Record, p. 59).

HUBERT GORDON (Record, pp. 60-63) was the Sheriff of Shelby County at the time about which evidence was heard and on direct examination he merely confirmed the physical facts of the Thursday evening and Friday morning trips to appellant's farm. On cross examination he stated that the color of the four (4) lambs taken was "practically all of its wool, just a brown, reddish brown cast, a little different on those from the other lambs."

This was all of the evidence introduced by the Commonwealth.

(2) The Evidence Introduced by Defendant

GILBERT TINSLEY (defendant) (Record, p. 65-85) testified that he is a resident of Shelby County, Kentucky, living on a farm about four and one-half (4½) miles east of Shelbyville on U. S. 60 which farm is jointly owned by him and his brother, Elmer Tinsley; that he and his brother are actively engaged in farming, raising tobacco, corn, wheat, hay, and livestock (Record, p. 66). He testified that he and his brother had engaged in raising and in some several sales and purchases of sheep and lambs for many years prior to the indictment; that the lambs raised were of mixed breeds produced by breeding Hampshiredown and Southdown bucks to Western and Native ewes (Record, p. 66).

The defendant had secured copies of stockyard invoices, etc., and produced some cancelled checks evidencing that he had been engaged in raising, buying, and selling sheep and lambs since at least 1947. The defendant began with the number of sheep and wool lambs wintered on his farm during the winter of 1947-48 and showed each transaction that had taken place from that time until the visit paid to his farm by the prosecuting witness which visit resulted in the indictment herein (Record, p. 66-71). He produced some documentary evidence substantiating each transaction

except one sale of fifteen (15) ewes and a buck for which he had no memorandum but which sale is not attacked in any way by the Commonwealth. The defendant testified that his last transaction was his purchase of fourteen (14) lambs outside the Lexington stockyards on August 4, 1948 (Record, p. 69-70). This purchase is documented by a check given for a small portion of the purchase price (Exhibit Tinsley No. 5; Record, p. 26, 70). Defendant further testified that he kept these fourteen (14) lambs in a separate field for about a week to see if there was anything wrong with them before mixing them with the other sheep and lambs on his farm and that on Wednesday, August 11th, he weaned twenty-eight (28) head of the lambs he had raised and put them in the field with the fourteen (14) lambs purchased at Lexington (Record, p. 71).

He further testified that he feeds phenothiazine to his lambs; that his lambs have access to a tobacco barn; that they lie around the barn and just outside it where he shoved the trash out the back door of the barn in cleaning it; and he verified the testimony of the prosecuting witnesses that the feeding of this drug alone with lying in the urine and manure mixed with tobacco barn trash causes their wool to acquire a red or brown cast during the summer months, especially when it is dry (Record, p. 72). He further testified that several of the lambs purchased at Lexington were colored so that there was no appreciable difference between the lambs purchased and the lambs raised (Record, p. 72-73). He also testified that he could not distinguish the lambs purchased in Lexington from the lambs raised on his own farm but that, after Mr. Jackson had removed the four (4) lambs he claimed, there was one group of eleven (11) lambs that congregated together and tried to get into the field where the Lexington lambs had been grazing so as to cause him to believe that three (3) of the lambs taken were three (3) of those purchased in Lexington while the

fourth one was probably raised on appellant's farm and was one of the twenty-eight (28) that had just been weaned two (2) days before (Record, p. 73-74).

The witness flatly denied that he had stolen any lambs from Laban Jackson (Record, p. 76) or that he had been on the Jackson farm since seven (7) or eight (8) years prior to the trial (Record, p. 75). He further testified that he was not at home on Thursday, August 12th, when the prosecuting witness and others visited his farm and knew nothing about their accusations until he returned home just about dark (Record, p. 82) and that he remained at home all of that night (the night the prosecuting witness says four (4) lambs belonging to him and four (4) strange lambs made their appearance on the Jackson farm). The defendant further testified that on Friday, August 13th, he was served with an order of delivery for twelve (12) lambs; that after all of his lambs had been rounded up in his barn and examined, the Sheriff, at the direction of the prosecuting witness and upon the asserted authority of the County Attorney, changed the figure on the order from twelve (12) to seven (7) lambs, this at a time when Mr. Jackson had segregated (7) lambs into one stall (Record, p. 75); and that the figure was finally reduced to four (4) lambs that the prosecuting witness asserted were his although no further change was made on the order of delivery (Record, p. 173; Tinsley Exhibit No. 6, Record, p. 25, 76).

Stanley Smith (Record, p. 85-89) testified that he lives on an adjoining farm to defendant and has raised sheep for thirty-five or forty years (Record, p. 86); that the Tinsley boys raise a mixed type of sheep and lambs, "Southdowns and Hampshires and possibly some Dorsetts" (Record, p. 86); and that they feed phenothiazine to their sheep and lambs (Record, p. 86). He further stated that defendant's testimony as to how many spring lambs he raised (1948) is "not out of line" with the number

of ewes wintered (Record, p. 86). This witness was present when Mr. Jackson picked over defendant's lambs and testified that "some lambs were a little darker than others", "some of them had a brownish cast" (Record, p. 87). The witness further said that those with a brownish cast were "more than . . . four", "I would say ten or twelve" (Record, p. 88). Mr. Smith went with the defendant to the State National Bank at Frankfort and received from the bank defendant's cancelled checks and found among them the check to Sam Ford for Seventy-five ($75.00) Dollars of the purchase price of the fourteen (14) lambs purchased at Lexington (Record, p. 88).

Herbert Tinsley (Record, p. 89-90) is a cousin of defendant. He lives near Eminence, Kentucky, and verified the number of ewes that the defendant and his brother wintered in 1948 and the approximate number of lambs on the farm in April, 1948.

Ollie O'Nan (Record, p. 91-95, 105) testified that he lives at Eminence, Kentucky; works in a hospital there; and has known the defendant twenty-five or thirty years (Record, p. 91). This witness saw defendant pass a truck-stop near Frankfort on August 4, 1948, travelling from the direction of Lexington toward his Shelby County farm and driving a Model "A" Ford truck with lambs in it. He recognized the truck and the defendant driving it (Record, p. 91), the witness fixing the date by its proximity to the "John Y. Brown" primary election day (Record, p. 91), but was not seen by the defendant (Record, p. 92). He did not volunteer his knowledge to defendant until "I thought it had done been settled" (Record, p. 94). This witness did not testify in the first trial and ". . . didn't aim to be in this one" (Record, p. 94).

R. L. Samples (Record, p. 95-97) testified that he lives in Spencer County; that he is related by marriage to defendant's brother; and that he visits the Tinsley home about

twice a month (Record, p. 95). He further testified that he raised sheep on his own farm for about three years and that it is not unusual for sheep to get a brownish cast to their wool (Record, p. 96).

WALTER SHOUSE (Record, p. 97-99) testified that he lives at Waddy, Kentucky; is no relation to the defendant, and that he has had twelve years experience raising sheep. This witness thinks that allowing lambs to lie in manure around a barn gives a brownish tint to their wool (Record, p. 98 and he testified that he does not think it possible for him to pick out his own lambs when they have grown to the size they attain by August (Record, p. 98). This witness went with the defendant and the witness Smith to the State National Bank in Frankfort and verifies the receipt from the bank of the cancelled check payable to the absent witness, Sam Ford, for part payment for fourteen (14) lambs purchased by the defendant.

HENRY BUCKLEY (Record, p. 99-100) testified that he lives in Louisville; that he is a brother-in-law of the defendant; that during a visit to defendant's farm in January of 1948 he "gate-counted" the ewes on the Tinsley farm; and that he does not remember the exact number but does remember that there were "eighty some odd".

Mrs. ELMER TINSLEY (Record, p. 101-105) is the wife of defendant's brother. She testified that they live in the same house with defendant and his wife (Record, p. 101) and that the defendant must go up the stairs, located directly over her bed, in order to reach the part of the house occupied by the defendant and his wife (Record, p. 102). Mrs. Tinsley was pregnant at the time about which evidence was heard and was expecting daily to go to the hospital for delivery of her baby. She testified that she, therefore, made a special effort to keep track of the whereabouts of her husband and the defendant so there would

be no delay in getting one of them to take her on her momentarily expected visit to the hospital (Record, p. 102). She further testified that she was with the defendant and others where the others were picking tomatoes in a back field when Mr. Jackson and the State Policeman first visited the farm about 2:00 P. M. on Thursday, August 12th (Record, p. 101). Nothing was said then about Mr. Jackson's suspicions (Record, p. 101). She further testified that defendant went to Shelbyville that afternoon and did not return until about 7:00 P. M.; that he went then upstairs to eat supper; that he did not come down again; and was still on the farm when the officers came back the next morning (Record, p. 101-102). She further stated that neither the defendant nor his brother was gone from the farm for any appreciable length of time during the period of her immediate expectancy without her knowledge of where they were (Record, p. 103). This witness verified defendant's testimony that on a morning about a week before the Jackson visit, defendant left home for Lexington with some hogs in his truck and returned later that day with a truck load of lambs (Record, p. 103).

She further testified that the wife of defendant was in poor health and not able to appear and testify (Record, p. 104).

This was all of the testimony for defendant.

ASSIGNMENT OF ERRORS TO BE URGED

The errors to be urged are as follows:

1. That the presumption indulged in by the trial Court and affirmed by the Court of Appeals of Kentucky deprived petitioner of due process of law because the presumption itself was and is unreasonable, arbitrary, and not a fair summary of experience.

2. That your petitioner was deprived of due process of law because a *prima facie* presumption was given the effect of evidence to be weighed against your petitioner's opposing testimony and was permitted to alone sustain a verdict of conviction.

ARGUMENT

It should first be noted that the Legislature of Kentucky has enacted Section 433.290 of the Kentucky Revised Statutes, which is in words and figures as follows:

> "*Receiving stolen property.* Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be *prima facie* evidence of his guilt under this section."

This statutory enactment provides that the possession by any person of any stolen property shall be *prima facie* evidence of his guilt of the crime of knowingly receiving stolen property. This section of the statutes has been in force in Kentucky for many years and was in force at the time of the trial complained of herein.

In the case at bar your petitioner was charged with the crime of grand larceny. Evidence was introduced by the Commonwealth which if believed by the Jury would have established that your petitioner had in his possession certain stolen property. That evidence was denied by petitioner and his witnesses but, nevertheless, the courts of Kentucky permitted the case to go to the Jury and the Court of Appeals of Kentucky affirmed the judgment of conviction upon the theory that possession of stolen property not only creates a *prima facie* presumption of guilt of

knowingly receiving that property as decreed by KRS 433.290, supra, but in the case at bar held that such possession created a presumption that your petitioner was guilty of the crime of larceny of the property.

Your petitioner urges that the presumption itself is unreasonable and arbitrary. It is not reasonable to assume that evidence of possession of stolen property or of any other remote fact would raise a presumption of two separate ultimate facts. Here the one hundred thirty-eight men of the Legislature of Kentucky have enacted a statute which holds that such evidence raises a presumption that the person having such property in his possession is guilty of knowingly receiving that property, which is a crime specifically denounced by the statute quoted supra; while the trial court and the Court of Appeals of Kentucky have held in the case at bar that such evidence raises a presumption that the possessor of the stolen property is guilty of an entirely different crime, to-wit: larceny of that property. See the decision in the case at bar, (Record, pages 113-114; Petition for Writ of Certiorari, appendix "C"):

> " 'The rule is that possession of stolen property shortly after the theft is not only presumptive evidence of guilt, casting upon the accused the burden of showing his innocence by explaining his possession to the satisfaction of the jury, but is of itself sufficient to sustain conviction for larceny . . .' "

Your petitioner urges the unreasonableness of the presumption that he was guilty of the crime of larceny merely because some evidence of his possession of stolen property was introduced into the record. That presumption would appear to be unreasonable and arbitrary and not a fair summary of experience because the statute of Kentucky, quoted supra, holds that the introduction of those facts raises a different presumption and because it is just as

reasonable to presume from said facts that the possessor of such property is guilty of a misdemeanor as an accessory after the fact, which is denounced by Kentucky Revised Statutes, Section 431.170[9] or that such a possessor has come innocently into the possession of such stolen property. The various presumptions that might be indulged in under the facts of the case at bar are very similar to those discussed by the New York Supreme Court in the case of *People* v. *Galbo,* 218 N. Y. 283; 112 N. E. 1041; 2 A. L. R. 1220, wherein the defendant, a cripple, was charged with the murder of one Francesco Manzella. Evidence was introduced in that case which pointed rather conclusively to the defendant's having been in possession of and having disposed of the dismembered body of the victim and the very presumption sought to be applied in the case at bar, to-wit: that possession of the fruit of the crime raised a sufficient presumption of guilt to sustain the conviction, had in that case, was there considered by the Court. We cite the following from that opinion:

> "The problem is a hard one. To solve it we must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law. It is an inference of fact. . . . . Other facts may neutralize it, or repel it, or render it so remote or tenuous or uncertain that in a given case we should reject it. . . . The guilty possessor of the body, though he did not use the weapon, may still have aided and abetted; but, unless there are tokens that several joined in the affray, the likelihood of his presence is no greater than the likelihood of his absence. He may still be an accessory; whether before the fact or after is the problem. If the

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[9] KRS 431.170—*Accessory after the fact; how punishable.* An accessory after the fact, not otherwise punished, shall be guilty of a high misdemeanor, and fined and imprisoned at the discretion of the jury. An accessory after the fact may be tried though the principal is not taken or tried. . . .

circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion that would mitigate his guilt. . . .

". . . We have no evidence, direct or circumstantial, that the actual perpetrator was assisted by anyone. We have nothing to tell us when or where the crime occurred. We have no sign that it was committed in the defendant's presence. He may have known of it in advance, and planned or encouraged it. He may have learned of it later, and attempted to shield the criminal. The trial judge told the jury that the burden was on the people to prove beyond a reasonable doubt that the defendant, though he did not kill with his own hand, was none the less a principal; he must have become connected with the crime while Manzella was yet alive. If all that he did was to help the murderer to escape, he was not a principal, but an accessory, and the jury, under the charge, were then required to acquit him. . . . . The charge is sound, but it propounded to the jury a problem incapable of reasoned solution. . . .

* * * * * * *

". . . In connecting him as a principal, conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt."

See also *Manley* v. *Georgia*, 279 U. S. 1, 73 L. ed. 575, wherein the following language is found:

". . . 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86, 60 L. ed. 899, 904, 36 Sup. Ct. Rep. 498."

The presumption given effect to in the case at bar is not even a presumption created by statute and is even at variance with the presumption that the statute says those facts create so it is certainly no stronger in effect than would be a presumption created by statute and in the case of *Mc-*

Farland v. *American Sugar Ref. Co.*, 241 U. S. 79, 86, 60 L. ed. 888, 904, 36 Sup. Ct. Rep. 498, the Court also used this language:

> ". . . The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime . . ."

Your petitioner respectfully urges that the decision of the Court of Appeals of Kentucky indulging the presumption that your petitioner was guilty of the crime of grand larceny because there was conflicting evidence in the record as to whether or not lambs in his possession were stolen property, is not in accord with this Court's decision in the case of *Bollenbach* v. *United States*, 326 U. S. 607, 90 L. ed. 350. In that case certain securities were stolen in Minneapolis and a short time thereafter were found in the possession of the defendant in New York; the defendant was indicted for transporting stolen securities in interstate commerce. The District Court, in that case, gave effect to a presumption almost identical to the presumption relied upon by the Commonwealth in the case at bar as shown by the following excerpt from that opinion:

> "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

In speaking of the presumption, this Court said:

> "The Government does not defend the 'presumption' as a fair summary of experience. It offends reason,

> so the Government admits, as much as did the presumption which was found unsupportable in Tot v. United States, 319 U. S. 463, 87 L. ed. 1519, 63 S. Ct. 1241, even though that was embodied in an Act of Congress."

Mr. Justice Frankfurter, delivering the opinion of the Court, continued to discuss the reasonableness of the presumption and referred to the fact that the Government argued to this Court that the indulgence in the presumption reflected merely "a quite cursory" and hurried instruction and that the Government, in effect, had asked this Court to pay no attention "to this palpably erroneous" statement of the law by the trial judge. The District Judge had authorized the indulgence of the presumption not in his main charge to the jury but in answer to a direct question from the jury as to whether or not such a presumption could be indulged by them in deciding the facts of the case and this Court reversed the case and established the utter unreasonableness of the presumption in these words:

> ". . . When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. *But he was not even 'cursorily' accurate. He was simply wrong.*" (Italics ours)

Your petitioner next respectfully urges that he was denied due process of law because the courts of Kentucky not only indulged a presumption that he was guilty of grand larceny when the only evidence introduced against him was directed toward establishing that the lambs in his possession were stolen property, but also gave to that presumption the weight of evidence and permitted the jury to weigh that presumption against your petitioner's actual evidence in order to determine his guilt or innocence.

This is a criminal case and a large majority of the cases that we will cite herein upon this point are civil cases but we have no hesitancy in citing those cases because if a presumption may not be given the effect of evidence to be weighed in the balances against actual evidence in a civil case without constituting the taking of property without due process of law then it necessarily follows that such weight may not be given to a presumption in a criminal case without depriving the criminal defendant of his liberty without due process of law.

One of the early cases decided on that point by this Honorable Court is the case of *Lincoln* v. *French,* 105 U. S. 614, 26 L. ed. 1189, where the presumption involved was that because of the terms of an instrument of conveyance and the passage of time it could be presumed that there had been a reconveyance of property. In that case this Court said:

> " . . . . Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."

Many of the cases decided by this Court prior to the decision in the case of *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. ed. 884, are summarized in that opinion and the following language found therein is particularly applicable to the question of how much weight may be given to a presumption without violation of the due process clause of the Fourteenth Amendment:

> " . . . . That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co.* v. *Brown,* 138 Miss. 39, 66 et seq. 102

So. 855; *Columbus & G. R. Co.* v. *Fondren*, 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

"The presumption raised by Section 2780 is unreasonable and arbitrary and violates the due process clause of the 14th Amendment. *Manley* v. *Georgia*, supra; *McFarland v. American Sugar Co.*, 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

"Judgment reversed."

The *Western & A. R. Co.* case, *supra*, was reviewed and discussed at length in the later case of *Atlantic Coast Line R. Co.* v. *Ford*, 287 U. S. 502, 77 L. Ed. 457, which is a case in which the statute of South Carolina there under consideration provided that when a person was injured by collision with a railroad train at a crossing and it appeared that certain signals required by the act were not in operation; that the railroad company would be presumed to have been operating its trains negligently and said negligence further presumed to be the proximate cause of any injury sustained and warrant recovery by the plaintiff. In that case the plaintiff recovered against the railroad company and the railroad company complained that it had been denied due process of law because the instructions given by the trial court did not make clear that the presumption vanished from the case upon the introduction of evidence by the railroad company. The railroad company contended, on the other hand, that the trial court construed the statute of South Carolina so as to give the weight of evidence to the presumption. The railroad company's contention is in words as follows:

" . . . . and that such presumption does not vanish from the case upon the introduction of evidence by the

> railroad company, but remains throughout to be considered by the jury as evidence . . . ."

This Honorable Court in considering the contention of the railroad company determined that the statute of South Carolina had not been so construed by the trial court and affirmed the judgment, but in the course of the opinion it was pointed out that the trial judge, immediately preceding the charge to the jury, quoted from *Western & A. R. Co.* v. *Henderson*, supra, the same words we have quoted immediately above in this brief and further said:

> " . . . . True, the jury was not told in so many words that where countervailing evidence has been put in the presumption comes to an end, but we think this is the fair purport of the language of the court to the effect that appellants may rebut the presumption by their evidence, and that then all the evidence must be considered in determining the question of proximate cause. Certainly, the charge contains no affirmative words directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case. Under these circumstances, a request for a more explicit instruction in exact accord with what had just been read as to the Mississippi statute undoubtedly would have been granted; but that request was not made."

The *Atlantic Coast Line* case, supra, appears to the writers of this brief to adequately support petitioner's contention that a presumption even if it may be reasonable in itself is merely a rule of procedure, that it governs the trial of a case so as to shift the burden to the adverse party and require him to go forward with the evidence but that when evidence is introduced so that the presumption comes in conflict with actual evidence, the presumption goes completely out of the case.

It is true that in the *Atlantic Coast Line* case the judgment was affirmed because no request was made for an instruction that the presumption no longer existed after opposing evidence had been introduced into the case, but that case is certainly authority for the proposition that if a request for a more explicit instruction, specifically pointing out to the jury that the presumption vanishes from the case upon the introduction of evidence, had been asked for it should have been given.

In the case at bar there was no evidence except the presumption which in any manner connected your petitioner with the crime charged in the indictment. Petitioner earnestly insists that the presumption of his guilt, if it was valid for any purpose at all, merely shifted to him the burden of going forward with evidence in his own behalf; that when he had introduced his evidence the presumption entirely disappeared so that there being nothing but that presumption connecting him with the crime charged, his motion for a peremptory instruction of acquittal should have been sustained; and that the failure of the trial court to so instruct the jury and the affirmance of that action by the Court of Appeals of Kentucky denied to this petitioner that due process of law guaranteed to him by the Fourteenth Amendment.

A more recent decision of this Honorable Court, which reaffirms the proposition that a presumption even though reasonable in itself acts only to take the place of evidence until actual evidence is introduced, and vanishes when confronted by opposing evidence, is the case of *New York Life Insurance Company* v. *Gamer*, 303 U. S. 161, 82 L. ed. 726. In that case, Gamer filed suit against the insurance company under a clause of the insurance policy providing for double indemnity in the case of accidental death. At the close of all the evidence, defendant insurance company requested

the Court to direct a verdict in its favor insisting that plaintiff had failed to prove accidental death and that the evidence showed death was caused by self destruction. The amount sued for was not payable in the event of self destruction. Plaintiff had proved that her decedent met death by violence and relied upon the presumption that death was not voluntary. The trial judge instructed the jury in these words:

> "The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary . . ."

This Court reversed the judgment because of the impropriety of that instruction and in the opinion used this language:

> "Upon the fact of violent death without more, the presumption, i.e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. Travellers Ins. Co. v. McConkey, supra (127 U. S. 665, 32 L. ed. 310, 8 S. Ct. 1360). It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. (Citations)"

The case just quoted from is particularly analogous to the case at bar because in both instances the plaintiff has

relied upon a presumption, the defendant has relied upon evidence, and the trial judge has permitted the jury to render its verdict conditioned upon whether it believes the presumption or believes the evidence.

In the case just cited from this Honorable Court has said:

"The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption".

In the case at bar there is certainly evidence sufficient to sustain a finding that your petitioner was innocent of the crime charged in the indictment. Therefore, it is respectfully urged that in the case at bar also "there was no foundation of fact for the application of the presumption". We respectfully submit that this case likewise must be decided upon the evidence and that your petitioner has been denied due process of law in that the courts of Kentucky permitted his conviction because the jury believed a presumption instead of believing the evidence, for as also stated by this Court (in the case of *Clyatt* v. *United States*, 197 U. S. 207, 49 L. ed. 726):

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

CONCLUSION

We respectfully submit that the presumption indulged in is unreasonable, arbitrary, not a fair summary of experience, and not in accord with the decisions of this Court cited herein; that the presumption should not have been given

the effect of evidence to be weighed in the balances against actual evidence; that the actions of the courts of Kentucky as complained of herein have denied due process of law to your petitioner in violation of the Fourteenth Amendment to the Constitution of the United States; and that the Writ of Certiorari prayed for herein should be granted and the judgment reversed.

Respectfully submitted,

CHAT CHANCELLOR,
Attorney for Petitioner.

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HAROLD B. WILLE

Supreme Court of The United States

October Term, 1952

No. [redacted] 60

GILBERT TINSLEY ----------Petitioner

VS:

COMMONWEALTH OF KENTUCKY ------Respondent

BRIEF FOR RESPONDENT

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Supreme Court of The United States

October Term, 1952

No. 782

GILBERT TINSLEY ----------Petitioner

VS:

COMMONWEALTH OF KENTUCKY -------Respondent

BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT CONSTITUTING THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

FOREWORD

WHERE A CONVICTION FOR VIOLATION OF A STATE STATUTE HAS BEEN AFFIRMED BY THE COURT OF LAST RESORT OF THE STATE AND THE TRIAL HAS BEEN CONDUCTED ACCORDING TO LONG ESTABLISHED PRECEDENT AND RULES OF EVIDENCE, THERE IS NO SUCH DENIAL OF THE DUE PROCESS CLAUSE OF SECTION 14 OF THE FEDERAL CONSTITUTION AS TO WARRANT THE SUPREME COURT IN GRANTING CERTIORARI TO REVIEW THE ACTION OF THE COURT OF APPEALS OF KENTUCKY WHICH AFFIRMED THE CONVICTION.

CASE HISTORY

The indictment charged petitioner, Gilbert Tinsley, and his brother, Elmer Tinsley, with the crime of grand larceny

by stealing eight lambs of the value of $200.00 from Laban Jackson and Mrs. Alph Jackson. Specifically the indictment charges violation of Section 433.220 of Kentucky Revised Statutes which reads as follows:

> "Any person guilty of larceny of money or other property of the value of $20.00 or more shall be confined in the penitentiary for not less than one or more than five years."

A companion statute is Section 433.290 of Kentucky Revised Statutes which reads as follows:

> "Receiving stolen property. Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section."

The constitutionality of Section 433.220 of Kentucky Revised Statutes under which petitioner was convicted is not questioned. Petitioner was first tried and convicted in the Shelby Circuit Court on October 20, 1948, with a sentence of two years in the penitentiary. He appealed to the Kentucky Court of Appeals and that conviction was reversed for error not involved in the petition here, which opinion is Tinsley v. Commonwealth, 312 Ky. 745, 229 S.W.2d 761.

After the filing of the mandate of the Court of Appeals in the Shelby Circuit Court on June 6, 1950, (T.R. p.2-3) there were several continuances of the case on motion of

petitioner on the ground that he had been unable to procure the attendance in his behalf of an alleged witness by the name of Sam Ford by whom, as petitioner claimed, he could prove that he had purchased the lambs from Ford which he is alleged to have stolen; and that had made said purchase from Ford at a stockyard in the City of Lexington, Kentucky. on August 4, 1948, within a few days prior to August 7, 1948, that prosecuting witness Laban Jackson testified the lambs were stolen from his farm and premises in Shelby County on or about August 7, or 11, 1948, (see T.R. p.28).

The Tinsleys and Jacksons were farmers and sheep raisers and lived in Shelby County, about 11 miles from each other. Jackson's testimony is set out at length on Pages 27 and 45 of the Transcript of Record herein, from which it will be noted that he testified that 12 lambs were stolen that were worth at that time about $20.00 each. When he discovered this theft about August 11, when he went to his field and counted his flock, he found that his wire fence had been staked down with stakes driven in the ground and pieces of string, and stake-poles and grass had been trampled down and strands of wool on the wire fence at the place where these lambs had been lifted over the fence and taken out of the field. On Thursday, following his discovery of the theft of the lambs, Jackson reported same to a Mr. Crowe, head of the Kentucky State Highway Patrol and he, Jackson, in company with John Isham, a State Highway Patrolman, conducted a search about the county for the stolen lambs and found ten of

them in a field on the farm of petitioner Tinsley. Upon this discovery he procured from the County Judge of Shelby County a writ of Claim and Delivery as provided by Chapter 2 of the Kentucky Court of Civil Procedure. He placed this writ in the hands of the sheriff of Shelby County and the sheriff proceeded to the Tinsley farm and took possession of four of these stolen lambs, as he was commanded in the writ, and turned same over to Laban Jackson and same were taken back to the Jackson premises. As we understand the testimony of Laban Jackson (T.R. p.33) the night of the day the sheriff placed these lambs on his premises he discovered the next morning that four more of these stolen lambs which had not been taken under the writ had, during the night, been placed in the Jackson pasture. Jackson says that four of these eight lambs were his and four were not his. While it cannot be assumed that Tinsley, realizing his guilt, had attempted to make restitution of four more lambs in the hope of avoiding prosecution, the jury must have drawn such inferences as Jackson testified that his flock was larger by four lambs when he examined the flock the next morning in his pasture which, he testified, "had been put into the field during the night."

Jackson, in answer to the following question No. 61 "Tell the Jury how they got back in the field?" answered, "On Highway 55 which runs on the east side of our farm and almost directly in front of my neighbor's home was a place on the wire fence where there was something looked like burlap sack and wool and grass trampled down where

the lambs had been handed back over the fence."

Question 56: "Did you see your sheep the next morning at your home before you came to Shelbyville?"

Answer: "I did."

Question 57: "Tell the Jury if there was any difference in the number of sheep there at your farm the next morning than there was that night when you went home."

Answer: "There was a difference of eight lambs."

Question 58: "Explain how the difference came about."

Answer: "The next morning I went out into the pasture I noticed the flock looked larger than it had the day before, so I counted them and I found that there were eight additional lambs and four of the lambs were mine and four were not. . ."

Laban Jackson was corroborated largely by Commonwealth witness Charles Bowling (T.R. p.51). Bowling, in answer to the following No. 53 question "Tell the Jury what you found." answered, "The lambs were put back in the field right in front, if any of you are familiar with the farm of L. T. Hammond, it was right in front of his yard. There is a high place in the road, you can see all over the country, and the fact of the matter is the lambs were put back over the fence right in front of his house."

Question 54: (T.R. p.51) "How could you tell those lambs had been put back into that specific spot?"

Answer: "The weeds had been trampled down on

the road side, pieces of wool and burlap sack stuck on the fence. You could see where they dropped them over the fence."

Question 55: "Did these lambs all belong to Mr. Jackson?"

Answer: "Yes, sir—no, the ones they brought back?"

Question 56: "Yes."

Answer: "No, sir."

Question 57: "How many belonged to Mr. Jackson?"

Answer: "Four."

Question 58: "Were they four of the same twelve you had missed a few nights before?"

Answer: "Yes, sir."

Much more incriminating evidence was introduced by the Commonwealth and especially by Commonwealth witness John Isham, detective of the Kentucky State Patrol, at Page 55 of the Transcript of Record, and by Hubert Gordon, Sheriff of Shelby County, who repossessed four of these lambs under the writ of Claim and Delivery. Petitioner Tinsley testifying in his own behalf, told the jury he had purchased these lambs at the stockyards in Lexington, Kentucky from a man by the name of Sam Ford, but he was unable to produce or establish any such person as Sam Ford existed. The trial court found as a judicial fact that Ford was a fictitious person.

ARGUMENT AND AUTHORITIES

Petitioner predicates his argument on the sole theory

that the refusal of the trial judge to sustain his motion to instruct the jury to find him not guilty at the close of all the evidence was a denial of due process. He contends that at most the evidence for the Commonwealth as to his possession of the stolen property raised only a presumption of guilt; that the mere proof that the stolen property was found in his possession and restored to the possession of Jackson by judicial process created only a presumption of guilt. That argument might be pursuasive or convincing if petitioner had sufficiently met and overcome the Commonwealth's prima facie case of guilt made by the Commonwealth by adducing clear and convincing evidence to the satisfaction of the jury that he had lawfully acquired title to the lambs in question. This he utterly failed to do. In other words, he did not overcome the presumption of guilt or meet or rebut it successfully even by his own affidavit as to what he claimed he could prove by the fictitious Sam Ford as the trial court found from evidence heard out of the presence of the jury, on a hearing of the motion for continuance upon which the Court judicially found and so adjudged that no such person as Sam Ford existed. We quote below from the opinion of the Court of Appeals of Kentucky affirming Tinsley's conviction, and Judge Comb's opinion (T.R. p.113-14):

> "Here it was shown to the satisfaction of the court that there was no such witness as Sam Ford. We have made careful examination of the proceedings had on the motion for continuance and are of the opinion the court exercised a sound judicial discretion in this finding of fact. It follows that the court was correct in overruling the motion for con-

tinuance and in excluding the defendant's affidavit. "The Commonwealth's case is based on the fact the stolen lambs were found in defendant's possession. There is no direct evidence otherwise connecting him with the theft of the lambs. He denied the theft and attempted to show that the lambs found in his possession belonged to him. It is argued that his possession of the lambs raised only a presumption of guilt, and that since the evidence in his behalf rebutted the presumption he was entitled to a peremptory instruction. We cannot agree. In the recent case of Crouch v. Commonwealth, (Ky.) 249 S.W.2d (fol.251) 540, it was said:

> 'The rule is that possession of stolen property shortly after the theft is not only presumptive evidence of guilt, casting upon the accused the burden of showing his innocence by explaining his possession to the satisfaction of the jury, but is of itself sufficient to sustain conviction for larceny. The jury was not compelled to accept the appellant's explanation as true, and the circumstances were such as to authorize a finding that the chickens had been stolen and that appellant was guilty of theft.'

"The case of Rogers v. Commonwealth, 289 Ky. 83, 158 S.W.2d 144, relied on by defendant, is explained and distinguished in the Crouch case.

"It was for the jury to decide whether defendant had satisfactorily explained the presumption of guilt raised by his possession of the stolen lambs. Two juries have refused to believe his explanation.

"What has already been said disposes of the contention that the defendant has been deprived of due process of law.

"The judgment is affirmed."

In the case of Howard v. Kentucky, 200 U.S. 164,

Howard was indicted, tried, and convicted for the killing of William Goebel. On appeal to the Supreme Court Howard contended that he had been denied due process under the 14th Amendment because of alleged disqualification of the juror, Alexander. The Supreme Court held that there was no denial of due process.

> "Subject to the requirement of due process of law, the states are under no restrictions as to their method of procedure in the administering of public justice." Jordan v. Mass., 225 U.S. 167, 32 S.Ct. 651.
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> "Where the proceedings of the State Court were conducted under the ordinary forms of criminal prosecution there was no denial of due process of law." Miller v. Texas, 153 U.S. 535, 38 L.ed. 812.
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> "If the Supreme Court of the State had acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances but this Court would feel justified in saying that there had been a failure of due legal process." Jordan v. Mass., supra.
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> "The admission of evidence in a criminal case which the high State Court decided did not violate the rights of accused under the State Constitution, and laws, cannot involve a question of due process of law of sufficient merit to sustain a Writ of Error." Barrington v. Missouri, 27 S.Ct. 582, 205 U.S. 483, 51 L. ed. 890.
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> "The judgment of state courts will not be reversed by the Supreme Court if they rest on adequate state ground." Hamilton v. Supreme Court of California in and for Los Angeles County 1951, 71 S.Ct. 521, 340 U.S. 622, 95 L. ed. 586.
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> "The construction by a state court of the statutes of that state and its rulings as to the admissibility

> of evidence furnish no basis for Writ of Error." Los Angeles Farming, etc., Co. v. Los Angeles, California, 30 S.Ct. 452, 54 L. ed. 736.
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> "The U.S. Supreme Court accepts interpretation of state laws by state appellate court." Madden v. Commonwealth of Kentucky, 1940, 60 S.Ct. 406, 309 U.S. 83, 84 L. ed. 590, A.L.R. 1383.

Numerous authorities are cited by petitioner to sustain his petition, among which is the Federal case of Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L. ed. 350. The Bollenbach indictment charged him with a conspiracy to violate the National Stolen Property Act. A reading of that opinion shows that his conviction was reversed because of instructions and remarks of the trial judge to the jury. The opinion also holds that the receipt of stolen property after its transportation across state lines was not a Federal crime at the time of the transaction in question, the Court saying in the opinion, viz:

> "Bollenbach could not properly be convicted of the offense for which he was charged and for which he was convicted, namely, for having conspired to transport securities across state lines, mererly on proof he was a 'fence', that is that he helped to dispose of the stolen securities after the interstate transportation was completed."
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> "The receipt of stolen securities after their transportation across state lines was not a Federal crime at the time of the transaction in question, and we need not consider the scope of a latter amendment making it so. See Act of August 3, 1939, 53 Stat. 1178, 18 U.S.C. Sec. 416 H.R. Rep. 422 76th Congress 1st Session (1939) and S. Rep. 674, 76th Congress 1st Session (1939)."

A pronounced distinction between the evidence of the Bollenbach case and the one at Bar is that there was absolutely no evidence whatever on behalf of the government that Bollenbach had stolen or was a party to the actual theft of the securities or that was there proof that Bollenbach knew when he transported the securities that they had been stolen.

> "The United States Supreme Court is bound by the construction given to state statutes by state courts. Aero Mayflower Transit Co. v. Board of R.R. Com'rs of State of Mont., Mont. 1947, 68 S.Ct. 167, 332 U.S. 495, 92 L. Ed. 99."
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> "Judgment of highest state court is conclusive as to construction and application of state statutes and Constitution. Senn v. Tile Layers Protective Union, Local No. 5, Wis. 1937, 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229. See, also, Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California, 1931, 51 S.Ct. 553, 283 U.S. 380, 85 L.Ed. 1128."

We quote below from Roberson's New Kentucky Criminal Law and Procedure, a recognized authority, Section 850, Pages 1074 and 1075, viz:

> "As evidence of the possession by the defendant of the property stolen is always admissible, so proof that part of the stolen property was found in the possession of an accused person shortly after the theft, and a failure to give a satisfactory account of how he came by it, are facts from which an inference of guilt may be drawn, and that all the property stolen at the same time and place was stolen by him, unless there is some fact or circumstance tending to show that it was not. 'Manifestly, a presumption as to the whole may arise from the unexplained discovery of a portion.' And the pos-

session of a part of the stolen property at a period somewhat distant from the larceny is competent evidence, but its weight and effect are very different from that of evidence of possession immediately after the larceny. It might be entirely insufficient to raise any such presumption against the party as would call upon him to explain his possession. Where two or more are indicted for larceny of goods, if on the separate trial of one of them the evidence shows that all of the property was stolen at the same time, it is competent for the Commonwealth to show in whose possession different articles of the stolen property were found."

We also quote Section 852, Page 1077, of the same authority, viz:

"On a trial for larceny, the defendant may explain his possession of the stolen property consistent with his innocence. And it is incumbent on him if he desires to overcome the effect of evidence of such possession to make the explanation. If unexplained, or not satisfactorily accounted for in a manner consistent with an innocent possession, it will justify a conviction. Any reasonable explanation by the defendant of his possession or his declarations respecting the possession, made by him at the time the property is first found in his possession, or when his right to it is first questioned, is admissible in his behalf. . . ."

(At Page 1079) ". . . The jury have a right to look to all the circumstances brought out by either party to determine whether any inference of guilt arising from the possession was counterbalanced. And whether the explanation offered is creditable or reasonable is a question for the jury."

A similar case from a factual standpoint is that of Abshire v. Commonwealth, 281 Ky. 470, wherein appellant

was convicted for chicken stealing. We quote from the opinion:

> "The record shows the following facts: On Saturday night, May 3, 1939, seven chickens worth from sixty to seventy-five cents each were stolen from Mrs. Letitia Belcher, who saw three men leaving her premises. One of these men was some 50 or 75 yards ahead of the other two and she did not recognize him and could not say whether or not he had chickens in his possession. She did recognize the two men behind him as being Clayton Abhire and Slone and they were carrying chickens which were 'squalling.' About dark the next afternoon Mrs. Belcher, in the company with the sheriff and one of his deputies, went to Lonzy's home and found two of her chickens roosting under the floor of his house. These chickens had their tail feathers cut off and the feathers about their heads had been tirmmed. She found three other of her chickens in some apple trees between Lonzy's house and Clayton's house, which were located near each other. Lonzy at first denied the chickens were at his house, but later said he had bought six chickens for $2.50 from Clayton and Slone the night before. When asked on Sunday afternoon by Mrs. Belcher if he had her chickens, Lonzy replied that he knew nothing about them. On cross-examination he gave as his reason for not informing Mrs. Belcher that he had bought some chicken the night before, was because she did not ask him that question.
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> "Clayton and Slone admitted stealing Mrs. Belcher's chickens Saturday night but denied that Lonzy had anything to do with the theft. They testified that after stealing the chickens they took them to Lonzy's home about 9 o'clock and he got out of bed and bought six of the chickens for $2.50. Lonzy's testimony was that he did not cut off the tail feathers

and the feathers about the head of the chickens to disguise them, but that his wife did this so the chickens he bought could be distinguished from others running on the place which belonged to his sister.

"From this statement of the evidence it is obvious this was a case for the jury. Where one is found in possession of stolen property, it becomes incumbent upon him to show how the property was acquired . . . . Should such evidence not satisfactorily explain his possession of the stolen property, or if his explanation is not believed by the jury, his possession of the stolen property not only justified that the case be submitted to the jury, but such fact is sufficient to sustain a verdict of conviction, . . . If the jury had believed the testimony of Lonzy, his brother and his brother-in-law, that the latter two alone were guilty of the theft, and that Lonzy had no connection therewith and that he purchased the chickens from them, he would have accounted for the stolen property being in his possession. But the jury refused to credit such testimony and instead accepted that offered by the commonwealth which refuted the proof offered by defendant. The jury is the sole judge of the evidence, and since we cannot say its verdict is flagrantly against the evidence, it cannot be disturbed by us." . . .

Another similar case is that of Clatos v. Commonwealth, 298 Ky. 851, wherein Clatos was convicted under KRS 433.290 of feloniously and knowingly receiving stolen property, to wit: a Jersey cow, the property of Earl Van-Hoose, alleged to be of the value of more than $20.00. We quote from the Clatos opinion:

"It will be noted that the 1922 Act, c. 113 amend-

ing this section, provides that 'the possession of any stolen goods shall be prima facie evidence of the guilt * * * * of any person or persons having such possession' and, therefore, when stolen property is found in the possession of a person, it is incumbent, or the burden is cast upon him to show his lack of guilty knowledge or that he legally acquired the property, and if there is any evidence or a probative nature, either direct or circumstantial, tending to combat the claim of legal acquisition, it is an issue for the jury . . . . While the possession of stolen property shifts the burden to person having possession of making satisfactory explanation, such possession creates only a rebuttable presumption of guilt rather than a conclusive one." . . .

ARGUMENT AND AUTHORITIES

In the case of Buckhalter v. People of New York, 319 U.S. 427, 63 S.Ct.R. 1129, Buckhalter, Weiss and Capone sought by writ of certiorari to have the Supreme Court review their convictions for first degree murder in violation of the laws of the State of New York. In these cases certiorari was denied an opinion by Justice Roberts from which case we quote:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the state free to enforce

their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.

"***As already stated the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law."

CONCLUSION

The Commonwealth of Kentucky, therefore, submits there is no Federal question presented and no such denial of due process as warrants the granting of certiorari and the petition for the writ should be denied.

Respectfully submitted,

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